90-53

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JERRY TUCKER,

Petitioner,

v.

OWEN BIEBER and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the pre-election discharge of an appointed union official, as the immediate result of his candidacy for elected union office against an incumbent office-holder, violate the free speech and assembly rights of union members guaranteed by § 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2)?

2. Must the claims of a union member asserting violations of democratic rights under a union constitution be resolved through the exercise of federal jurisdiction pursuant to § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and the application of federal substantive law?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 900 F.2d 973 (1990), and appears in the appendix to this Petition beginning at p. 1a. The opinions of the United States District Court for the Eastern District of Michigan are reported at 131 L.R.R.M. (BNA) 2979 & 2987 (1989) and appear in the appendix to this Petition beginning at p. 16a. The unreported decision of the UAW Public Review Board in *Brandt v. International Union, UAW*, PRB Case No. 787 II (1988), appears in the appendix to this Petition beginning at p. 41a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act provides:

> Every member of any labor organization shall have the *right to meet and assemble freely with other members; and to express any views, arguments or opinions*; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2) (emphasis added).

Section 102 of the Labor-Management Reporting and Disclosure Act provides in relevant part that

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

29 U.S.C. § 412.

Section 401(e) of the Labor-Management Reporting and Disclosure Act provides in relevant part that

> In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing *shall be eligible to be a candidate* and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, *without being subject to penalty, discipline, or improper interference or reprisal of any kind* by such organization or any member thereof.

29 U.S.C. § 481(e) (emphasis added).

Section 452.51 of the regulations of the United States Secretary of Labor interpreting § 401(e) of the Labor-Management Reporting and Disclosure Act, *supra*, provides:

> *A union may not adopt rules which in their effect discourage or paralyze any opposition to the incumbent officers.* Therefore, it would not be a reasonable qualification to require members to file a declaration of candidacy several months in advance of the nomination meeting since such a requirement would have such effect and "serves no reasonable purpose which cannot otherwise be satisfied without resort to this procedure."

29 C.F.R. § 452.51 (emphasis added).

Section 301(a) of the Labor-Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or *between any such labor organizations*, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (emphasis added).

STATEMENT OF THE CASE

Four days after he announced his candidacy in opposition to an incumbent union officer, Jerry Tucker was fired from his job on the staff of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. The thus-far successful UAW retaliatory discharge of Tucker further entrenches the union leadership and cuts at the very heart of union democracy in this country.

A. The Candidacy-Based Discharge of Jerry Tucker

In the spring of 1986, rank-and-file members of the United Automobile Workers organized to seek reform of their union, which they found had become undemocratic in its internal affairs and ineffective in its collective bargaining policies. As officer elections approached, the "New Directions" movement sought a candidate for Director of UAW Region 5.[1]

"New Directions" drafted Jerry Tucker, a veteran UAW International Representative then serving as the Region's Assistant Director. Tucker's experience had given him broad contacts with the union rank-and-file in Region 5 and a command of the UAW's affairs. Leadership of a respected staff member like Tucker was vital to the rank-and-file movement's chances for overcoming the built-in advantages of the incumbent officer. Particularly in a large, geographically-dispersed body such as Region 5, only a staff candidate has a realistic pros-

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[1] Region 5, headquartered in St. Louis, Missouri, spans eight states in the southwest central United States and comprises over 70,000 UAW members. The Regional Director has "direct supervision over all organizational activities within the region" (UAW Const. Art. 12, § 20) and sits on the UAW's International Executive Board, its highest governing body between triennial membership conventions.

pect for unseating an entrenched incumbent and effecting changes sought by the membership.[2]

The advantages of incumbency are especially formidable in the UAW because of the role played by the "Administration Caucus," now the UAW's ruling party and historically its only political party. As its name suggests, the Caucus is synonymous with the union's incumbent group and its loyalists.[3] Region 5's long-time incumbent Director, Kenneth Worley, belonged to the "Administration Caucus" as did every other top UAW official.

On May 12, 1986, four days after he announced his challenge to Worley, Tucker was fired from his staff job as an International Representative by UAW International President Owen Bieber. Tucker's discharge was based on violation of a candidacy rule of contested authority and legality: the so-called "90-day" Rule. The Rule requires an appointed UAW staff member to announce his candidacy at least 90 days before the election and to take an unpaid leave of absence during the campaign—*if, and only if, he intends to challenge an incumbent officer.*[4]

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[2] Because of the incumbents' vast advantages, the courts and commentators have understood the vital importance of protecting the candidacy rights of union staff members. *See* p. 14, *infra*. This Court has recognized that incumbents "have the treasury of the union at their command and the paid union counsel at their beck and call . . . ." *Hall v. Cole*, 412 U.S. 1, 13 (1973).

[3] The role of the Administration Caucus in the UAW is similar to that of the "Administration Party" whose self-perpetuating candidacy rules and related practices were described critically by the Court in *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 501-03 (1968).

[4] In its entirety, the "90-day" Rule states:

> "A staff member who decides to run against an officer or Regional Director must make his intentions known and request a leave of absence at least ninety days prior to the convention. Such staff member will be given a leave of absence and be

This device for perpetuating incumbent officers and preserving "one-party" discipline is not a *union* rule at all. It *appears nowhere in the UAW Constitution*, nor has it ever been approved by the union's members. Although enforced against Tucker by the official edict of the UAW's president, the "90-day" Rule was actually created by the Administration Caucus and not enacted by the UAW membership (*see infra*, p. 10). Indeed, the UAW Constitution expressly guarantees the unrestricted candidacy rights of appointed staff members:

> An International Representative or temporary organizer *shall be eligible as a candidate* for an elective office in the International Union.

UAW Const. Art. 14, § 5 (emphasis added). The Constitution also limits the grounds for which a staff member may be discharged.[5] Seeking elective office—a matter of right under the UAW Constitution—is not among them.

As a consequence of his firing and other determined efforts by the UAW's ruling group to defeat him, Tucker narrowly "lost" his election bid.[6]

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subject to reassignment in the event he is an unsuccessful candidate."

The Rule, as it appears in an internal memorandum circulated among the UAW hierarchy, is reproduced in the appendix to this Petition at p. 61a. No similar advance-declaration rule applies to incumbent officers who seek re-election. Nor does the "90-day" Rule apply when a staff member seeks an office being vacated by an incumbent.

[5] Article 13, Section 5 of the UAW Constitution provides in relevant part:

> "The International President may remove from the payroll any Representative derelict in the performance of any duty, guilty of any dishonest act, or to conserve the finances of th[e] International Union, pending the approval of the International Executive Board at its next session."

UAW Const. Art. 13, § 5.

[6] According to the UAW's count, Tucker was defeated by a margin of 324.577 to 324.415, less than one one-thousandth of the total delegate-vote. *See Brock v. International Union, UAW*, 889

B. The Proceedings Below

Tucker challenged his discharge in a suit filed in the United States District Court for the Eastern District of Michigan on September 30, 1986.

Tucker's complaint alleged a violation of § 101(a)(2) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2), which guarantees the free speech and assembly rights of union members and which is made enforceable by union members under LMRDA § 102, 29 U.S.C. § 412. Tucker claimed that his firing from the UAW staff retaliated against his own exercise of LMRDA-protected rights, chilled the rights of other UAW members, and furthered a program by the UAW hierarchy to suppress dissent within the union.

Tucker also asserted violations of the UAW Constitution, which, in express terms, guarantees the rights of union staff members to run for elective office in the union and protects their job tenure. Federal jurisdiction over the union constitution-based claims was predicated on § 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a).

On January 19, 1989, the District Court entered summary judgment against Tucker, rejecting both his LMRDA claim and his claim based upon the UAW Constitution. 40a. Tucker promptly moved to vacate the judgment, based on an intervening decision of this Court.[7] On May 18, 1989, the District Court denied Tucker's motion. 16a. Tucker appealed.

F.2d 685, 687 & n.2 (6th Cir. 1989). The extraordinary narrowness of the margin, and Tucker's success in a later court-ordered re-run election, leave little doubt that Tucker would have won the 1986 election decisively, but for the unlawful interference of the UAW Administration.

[7] *Sheet Metal Workers' Int'l Ass'n v. Lynn*, —— U.S. ——, 109 S.Ct. 639 (1989).

On April 13, 1990, the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, adopting the lower court's reasoning. 1a.

In concluding that Tucker's discharge did not violate LMRDA § 101(a)(2), the Court of Appeals focused on Tucker's status as an appointed official. 10a-11a. It discounted the chilling effect of Tucker's discharge and other determined efforts of the UAW's ruling party to defeat him. Observing that Tucker had nearly prevailed in the election despite his firing, 11a, the Court of Appeals ignored the near-certainty that Tucker would have won the election, and won decisively, but for the effects of his political firing and other ensuing violations by the ruling group.

In holding that Tucker's discharge did not violate the UAW Constitution, the Sixth Circuit declined to recognize federal jurisdiction over Tucker's union constitution-based claims. It held instead that these claims were properly resolved by the exercise of pendent jurisdiction. 14a. Failing to apply federal substantive law in interpreting the UAW Constitution, the Court of Appeals deferred to the decision of an internal union body (described below) which saw no inconsistency between the pro-incumbent "90-day" Rule and the Constitution's unrestricted guarantee of candidacy rights to UAW staff members. 11a-15a.

C. The Secretary of Labor's Challenge to the "90-day" Rule

Tucker's discharge-suit was paralleled by litigation in the same court initiated by the Secretary of Labor, who successfully sought to overturn the Region 5 election under Title IV of the LMRDA, 29 U.S.C. §§ 481-483.

Among the grounds advanced by the Secretary for invalidating the election were the "90-day" Rule and Tucker's discharge pursuant to the Rule—violations of LMRDA § 401(e), 29 U.S.C. § 481(e), which prohibits unreasonable candidacy requirements, as well as repri-

sals against candidates and their supporters.[8] The Secretary has characterized the "90-day" Rule as an unlawful "device by which the current union officers . . . can perpetuate their leadership," by launching a "preemptive strike against [their] most likely challengers."[9]

Although a re-run election ultimately was ordered on other grounds, the District Court never reached the issues posed by the "90-day" Rule, determining that they were moot. *Brock v. International Union, UAW*, 682 F. Supp. 1415, 1427, 1433 (E.D. Mich. 1988).[10] This conclusion was endorsed by the Court of Appeals. *Brock v.*

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[8] The Secretary also claimed that Tucker was denied a fair vote count at the Convention in that delegates from local unions which had failed to hold delegate elections were improperly seated; that union resources were improperly used to support Worley's campaign; and that Tucker's supporters had been threatened and coerced by pro-incumbent forces. *See Brock v. International Union, UAW*, 682 F. Supp. 1415, 1428-30 (E.D. Mich. 1988).

[9] Supplemental Brief for Secretary of Labor at 9, *Brock v. International Union, UAW*, 889 F.2d 685 (6th Cir. 1989) (Nos. 88-1416/1539). As we will explain, this Court has determined that union rules which force prospective candidates to announce their candidacies far in advance of the election are unlawful. The Secretary of Labor's LMRDA-interpretive regulations bar such rules. See *infra*, p. 22.

[10] The District Court did observe that, as a result of his discharge, Tucker was "denied access to the floor of the convention"; that he was "[t]hus . . . unable to campaign for office at the convention"; and that the "fact of his discharge was common knowledge among the delegates." *Brock v. International Union, UAW, supra*, 682 F. Supp. at 1418. The District Court repeated its observation in this case. 22a.

Notably, Tucker won the court-ordered re-run election, which was conducted under the close supervision of the Secretary. Installed as Director of Region 5 in September, 1988, Tucker was defeated in an unsupervised election held in June 1989. That election is currently under investigation by the Secretary of Labor. Following his ostensible defeat, Tucker reverted to his status as a discharged staff member and thus was removed from the UAW payroll.

International Union, UAW, 889 F.2d 685, 692-94 (6th Cir. 1989) (vacating re-run order as moot). As a result, no court below has even considered the legality of the "90-day" Rule and Tucker's discharge in light of LMRDA § 401(e).

D. The Public Review Board's Approval of the "90-day" Rule

While Tucker's discharge suit was pending, and the Secretary of Labor's litigation proceeded, the UAW Public Review Board ("PRB"), an internal union body, upheld the validity of the "90-day" Rule under the UAW Constitution. *Brandt v. International Union, UAW*, PRB Case No. 787 II (Apr. 22, 1988) ("*Brandt II*").

Tucker presented the PRB with documentary evidence revealing that the sole written source of the Rule was a September 23, 1983 memorandum from UAW president Owen Bieber to members of the International Executive Board ("IEB"). The memorandum—made part of the record in this case by Tucker, but never produced by the UAW in discovery—referred to "Internal rules adopted by the Board Caucus": i.e., the highest unit of the Administration Caucus, the UAW's ruling political party.[11] 61a.

Despite this evidence, the PRB concluded that the "90-day" Rule was an official union regulation, and not simply a party mechanism for enforcing loyalty to current office-holders. At the same time, the PRB recognized that the Rule was not contained in the UAW Constitution, that the Rule had not been adopted in compliance with

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[11] Those rules imposed a number of duties on Administration Caucus members at various levels of the union hierarchy, reciting that the "programs and policies of the Administration as may be determined through caucus decisions are to be supported by the caucus members" and that a "staff member has the same obligation to support a political decision of a caucus as does a member of the Executive Board." 64a.

the constitutional requirements for formal action by the IEB, and that the Rule clearly favored incumbent officers. 49a-50a, 55a.

In the course of its opinion, the PRB approvingly described the UAW as a

> one-party institution not in all respects unlike that found in many national governments in which . . . the officials who formally make and administer the laws pursuant to which the country is governed are selected wholly by the party.

50a. Nothing better highlights the grave implications for union democracy posed by this case than the PRB's enthusiastic endorsement of single-party governments elsewhere in the world as models for the UAW and other American unions.

REASONS FOR GRANTING THE WRIT

I. THE PRE-ELECTION FIRING OF AN APPOINTED UNION OFFICIAL, AS THE IMMEDIATE RESULT OF HIS CANDIDACY AGAINST AN INCUMBENT OFFICER, UNDERMINES THE DEMOCRATIC OBJECTIVES OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT.

Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 411-415, was "specifically designed to protect the union member's right to seek higher office within the union," in light of the often overwhelming advantages of incumbency in union elections. *Hall v. Cole*, 412 U.S. 1, 14 (1973). As the Court in *Hall* observed, incumbent officers have jealously guarded their positions:

> In describing to the Senate the various "offenses" for which a union member could be expelled under then-existing union constitutions, Senator McClellan [chief Congressional sponsor of the LMRDA] pointed out in particular the "offense" of "applying for the position of another union man in office." He observed,

> with evident sarcasm, that: "A member had better not do that. The officers have squatters' rights. Members had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined."

412 U.S. at 14 n. 22. This case involves just such retaliation, imposed by means of a candidacy rule that applies only when incumbent officers are challenged and that conflicts dramatically with the objective of Title I.

This Court's decision in *United Steelworkers of America v. Sadlowski*, 457 U.S. 102 (1982), despite reflecting a close division over the union rule at issue, underscores the vital role of staff candidacies in preventing union hierarchies from becoming permanently entrenched. The *Sadlowski* majority recognized the significant benefits to internal democracy which follow when

> [s]taff officers have [the] contractual right to choose whether or not to participate in any [union election] campaign without being subjected to discipline or reprisal for their decision.

457 U.S. at 114-15. Here, the UAW membership, through the union's constitution, extended this "contractual right" to staff members.

Critical to the result in *Sadlowski* was the fact that the challenged union rule had been adopted "through democratic processes . . . by an overwhelming majority of the delegates" at the Steelworkers' union convention. 457 U.S. at 115 n. 9. The Court disclaimed any intent to approve a rule "forced upon the union members by high union officers, who wanted to ensure that they were insulated from effective challenges in future elections." *Id.* The record here shows that the "90-day" Rule, a product of the UAW's Administration Caucus, is precisely such a provision.

The four dissenting Justices in *Sadlowski* emphasized that the enforced loyalty of the union staff is integral to

"entrenched, autocratic leadership bent on maintaining itself by fair means or foul"—the "paradigmatic situation that Congress intended to address by guaranteeing free elections" in the LMRDA. 457 U.S. at 124. Writing for Chief Justice Burger, Justice Brennan, and Justice Blackmun, Justice White observed that in most unions, "[t]here is only a one-party system consisting of the union's incumbent officers and hired staff all controlled from the top down." *Id.* at 128. Incumbent union officers

> have normally appointed the union staff, the bureaucracy that makes the union run. The staff is dependent upon and totally loyal to the leadership. It amounts to a built-in campaign organization. . . .

Id. at 124.

Permitting incumbent officers to maintain party-discipline by discharging "disloyal" staff members for exercising protected electoral rights frustrates the free choice of leaders by the union rank-and-file and insures the perpetuation of the one-party system. It squelches opposition candidacies by the sole persons with realistic prospects of unseating entrenched incumbents. From the standpoint of union democracy, this case may be the most important ever to come before this Court.

This Court has twice examined the discharge of union officials in light of the "basic objective" of the Labor-Management Reporting and Disclosure Act: "ensuring that unions [are] democratically governed and responsive to the will of their memberships." *Sheet Metal Workers' Int'l Ass'n v. Lynn*, —— U.S. ——, 109 S.Ct. 639, 643 (1989), quoting *Finnegan v. Leu*, 456 U.S. 431, 436 (1982). Left standing, the decision below threatens a vital means of furthering the LMRDA's basic objective: the electoral candidacies of union staff members who alone have the ability to mount effective challenges to

entrenched union leaders.[12] By the "90-day" Rule, perpetuation of incumbency is guaranteed.

The long-term importance of protecting the candidacy rights of union staff members cannot be overstated. As the courts and commentators have understood, "[t]hose who hold responsible offices in a labor organization may well be in the best position effectively to challenge the incumbent group which, in the nature of things, seeks to be entrenched." *Retail Clerks Union, Local 648 v. Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012, 1021 (D.D.C. 1969) (Gesell, J.). *See* Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md. L. Rev. 93, 106-07 (1984); James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 Harv. C.R.-C.L. L. Rev. 247, 263-66 (1978). *See also Sadlowski*, *supra*, 457 U.S. at 115 (noting successful staff candidacies in Steelworkers union).[13]

Neither of this Court's prior decisions involving union-official discharges—discharges not aimed at protecting

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[12] Professor Clyde Summers, whose "Bill of Rights for Union Members" provided the model for the LMRDA's guarantees, has explained how the simple *possibility* of staff-member candidacies promotes union democracy:

> "Because those who were part of the hierarchy have political skills, political allies, and perhaps name identification, they may have a good chance of unseating the incumbents. . . . It is the realization by the top officers that they have around them some who would take advantage of discontent to displace them that *increases their sensitivity to the needs and desires of the members.*"

Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 Md. L. Rev. 93, 107 (1984) (emphasis added).

[13] Discounting the "90-day" Rule's anti-democratic effect, the District Court observed that the Rule applies only to the "approximately 0.068% of the UAW's membership" who occupy staff positions. *Brock v. International Union, UAW*, *supra*, 682 F. Supp. at 1426. The District Court failed to understand that it is this small fraction of the membership which alone can mount credible challenges to incumbent officers.

incumbents against electoral challenges—answers the important question posed here. Their reasoning, however, demonstrates that the Court of Appeals erred in upholding the election-eve discharge of a union staff member because he had declared his candidacy against an incumbent officer.

In *Finnegan v. Leu*, *supra*, this Court held that the post-election discharge of appointed union business agents, by the union's newly-elected president, did not violate the free speech and assembly guarantees of LMRDA § 101 (a)(2), despite the incidental chill cast over the business agents' electoral activity by the prospect of dismissal if their candidate lost. The *Finnegan* Court observed that "neither the language nor the legislative history of the Act suggests that it was intended even to address the issue of union patronage." 456 U.S. at 441. The Court did allude to at least one circumstance in which the discharge of an appointed official *would* be actionable under the LMRDA: when it was part of a "purposeful and deliberate attempt . . . to suppress dissent within the union." *Id.* Surely the discharge of a candidate for union office, precisely *because* he has challenged an incumbent, amounts to the attempted suppression of dissent.

In *Lynn*, decided seven years after *Finnegan*, the Court unanimously overturned the removal of an elected local union official who had opposed a dues increase sponsored by a representative of the international union. *Lynn* makes clear that the legality of a union official's discharge "must be judged by reference to the LMRDA's basic objective", which includes insuring that union members "are free to discuss union policies and criticize the leadership without fear of reprisal." 109 S. Ct. at 644-45.

It is not necessary, the *Lynn* Court pointed out, for a "union official [to] establish that his firing was part of a systematic effort to stifle dissent within the union" in

order to state an LMRDA claim. *Id.* at 645 n. 7. What matters, rather is the predictable impact of the discharge on democracy within the union. Writing for the Court, Justice Marshall thus distinguished *Finnegan* and its insulation of a constitutionally-authorized patronage system:

> [T]he potential chilling effect on [LMRDA] Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues increase proposal, *other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril.* This is precisely what Congress sought to prevent when it passed the LMRDA.

Id. at 645 (emphasis added; internal citation and footnote omitted).

As did *Finnegan*, this case involves the discharge of an appointed union official. But the similarity ends there. The union president in *Finnegan* had "plenary authority" under the union's bylaws to appoint and remove business agents. 456 U.S. at 441. The authority of UAW president Bieber was sharply limited. The UAW Constitution granted Jerry Tucker both the unrestricted right to seek elective office (Art. 14, § 5) and the right to be discharged only for specified reasons (Art. 13, § 5).

Obviously, Tucker's firing, four days after his declaration of candidacy, was *not* the result of the routine operation of a union patronage system. It had everything to do with the sharply contested 1986 election, and it did nothing to advance the membership mandate expressed three years earlier, when UAW president Bieber and the

incumbent Regional Director were elected without opposition.[14]

The real aim of Tucker's discharge was clear: to serve notice on Tucker and on "New Directions" supporters that dissent would not be tolerated. The circumstances, including the unlawful campaign tactics deployed against Tucker, demonstrate that the UAW Administration intended to crush not only Tucker's candidacy, but also the fledgling movement he represented. Tucker's discharge thus violated the LMRDA's guarantees even under the strict test acknowledged in *Finnegan*.

This Court's decision in *Lynn* should have removed all doubt. Tucker's electoral defeat only three weeks after his firing, coupled with his victory in the re-run election supervised by the Secretary of Labor, strongly suggests that in 1986 UAW members had "concluded that one challenged the union's hierarchy, if at all, at one's peril", as the *Lynn* Court put it.[15] The Court of Appeals largely

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[14] Nor was some neutral, institutional purpose served by firing Tucker less than a month before the election. Tucker had requested an unpaid leave of absence for the duration of the campaign, eliminating any possible conflict in the administration of the Region.

[15] *Lynn* makes clear that it is the "potential chilling effect," 109 S. Ct. at 645, of a discharge which controls, and not (as the Court of Appeals apparently believed) the existence of unequivocal evidence of an actual impact on other union members. *See also Hall v. Cole*, *supra*, 412 U.S. at 9 (successful LMRDA Title I litigant "dispels the 'chill' cast upon the rights of others" and thus confers common benefit on union members).

Federal courts have recognized that the discharge of a staff-member candidate chills electoral participation and free speech across the union, by "serv[ing] notice of what might be expected on all officers, employees, and members . . . vulnerable to similar reprisals." *Hodgson v. United Mine Workers of America*, 344 F. Supp. 17, 28 (D.D.C. 1972) (finding violation of LMRDA § 401(e), prohibiting reprisals for exercise of electoral rights). *Cf. Yablonski v. United Mine Workers of America*, 71 L.R.R.M. (BNA) 3041 (D.D.C. 1969) (enjoining discharge of appointed official eight days after announcement of candidacy).

ignored the context of Tucker's discharge, discounting its chilling effect by noting that Tucker was not prevented from running and, indeed, "nearly defeated" the incumbent in the subsequent election. 11a. The discharged official in *Lynn*, of course, was not prevented from speaking out. The Court there described the Sixth Circuit's sort of reasoning as "unpersuasive," observing that a reprisal for exercising protected rights violates those rights, just as a direct restriction would. 109 S.Ct. at 644.

By focusing narrowly on Tucker's status as an appointed official, and by mechanically applying *Finnegan*, the Court of Appeals disregarded this Court's admonition that the freedom "to discuss union policies and criticize the leadership without fear of reprisal" is

> particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership.

Sadlowski, supra, 457 U.S. at 112. For the purposes of the LMRDA, there is simply no meaningful distinction between the removal of an elected union official for his speech in office and the discharge of a union staff member for aiming to unseat an incumbent official. Both the office-holder and the candidate represent a constituency of union members whose rights are implicated by retaliation against their leaders.

The decision below authorizes reprisal according to rule—a rule adopted by incumbent officers, for incumbent officers, as a last bit of protection against meaningful challenge. The one-party system tacitly endorsed by the Sixth Circuit insures that union elections will be empty rituals and rank-and-file dissent a matter only for the brave or the foolish. This is not the vision Congress had more than thirty years ago when it enacted the LMRDA. By granting this Petition, and by reversing

the Sixth Circuit, this Court can preserve the full potential of elections to create unions governed from the bottom up, and not from the top down.

II. CLAIMS OF VIOLATIONS OF A UNION CONSTITUTION BROUGHT BY AN INDIVIDUAL UNION MEMBER ARE FEDERAL CLAIMS AND MUST BE RESOLVED BY APPLYING CONTROLLING PRINCIPLES OF FEDERAL LAW.

The LMRDA is a floor, and not a ceiling, for the democratic rights of union members. In addition to the minimum guarantees extended by the "Bill of Rights" provision of LMRDA Title I, LMRDA § 201(a) requires unions to "adopt a constitution and bylaws," 29 U.S.C. § 431(a), which serve as an independent source of rights.[16] These charters embody the efforts of union members themselves to check the abuses of power which prompted passage of the LMRDA. A union's constitution long has been recognized as an enforceable contract between the union and its members. *See generally International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 618-19 (1958).

A. The Sixth Circuit's Refusal to Recognize Federal Jurisdiction of Tucker's Union Constitution-Based Claims Conflicts with Decisions of Other Courts of Appeals.

In *United Ass'n of Journeymen v. Local 334, United Ass'n of Journeymen*, 452 U.S. 615 (1981), this Court held that—at least when the dispute is between affiliated unions—union constitutions are enforceable contracts between labor organizations for purposes of conferring federal jurisdiction under § 301(a) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185(a).

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[16] *See* LMRDA § 103, 29 U.S.C. § 413 ("Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization . . . under the constitution and bylaws of any labor organization").

Journeymen left open an issue presented by this case: "whether individual union members may bring suit [under § 301(a)] on a union constitution against a labor organization." 452 U.S. at 627 n. 16.

Here, the Sixth Circuit, reaffirming its pre-*Journeymen* decision in *Trail v. International Bhd. of Teamsters*, 542 F.2d 961 (6th Cir. 1976), held that no jurisdiction under LMRA § 301(a) exists for such suits. 14a. (As we will explain, the Sixth Circuit's jurisdictional holding allowed the Court of Appeals to sustain Tucker's discharge for violating the "90-day" Rule *without ever determining that the Rule was valid under federal law.*)

The Sixth Circuit's jurisdictional holding is in direct conflict with post-*Journeymen* decisions of the Third and Ninth Circuits, as well as with a pre-*Journeymen* decision of the Second Circuit, which all have upheld § 301(a) jurisdiction for union constitution-based suits brought by individual members against their unions. *Lewis v. International Bhd. of Teamsters, Local Union No. 771*, 826 F.2d 1310, 1312-14 (3rd Cir. 1987); *Kinney v. International Bhd. of Elec. Workers*, 669 F.2d 1222, 1229 (9th Cir. 1982); *Abrams v. Carrier Corp.*, 434 F.2d 1234, 1247-48 (2d Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). The Sixth Circuit itself alluded to that conflict here. 14a.[17]

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[17] In *Trail, supra*, the decision to which it still adheres, the Sixth Circuit reasoned that LMRA § 301(a) jurisdiction was unnecessary in light of the other federal remedies open to union members, including those created by the Labor-Management Reporting and Disclosure Act. 542 F.2d at 968. The underpinnings of *Trail* were removed by the *Journeymen* Court when it rejected the argument that passage of the LMRDA in 1959, twelve years after LMRA § 301(a) was enacted, confirmed that Congress "did not contemplate that § 301(a) would reach union constitutions." 451 U.S. at 626 n.14.

There is no sound reason, meanwhile, for holding that the status of a union constitution as a "contract between labor organizations" varies with the identity of the party who brings suit for a contract-violation. *Cf. Smith v. Detroit Evening News Ass'n*, 371 U.S. 195, 200 (1962) (rejecting argument that § 301 jurisdiction did not extend

B. As a Result of Its Jurisdictional Ruling, the Court of Appeals Failed to Apply Controlling Principles of Federal Law Which Properly Govern the Interpretation of Democratic Rights Under a Union Constitution.

In *Journeymen*, this Court held that when a federal court exercises jurisdiction over union-constitution based claims under § 301(a) of the Labor-Management Relations Act, the "substantive law to apply 'is federal law, which the courts must fashion from the policy of our national labor laws.'" 452 U.S. at 627, quoting *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957). In this case, the Court of Appeals considered the merits of Jerry Tucker's UAW constitutional claims (reached by the District Court as a matter of pendent jurisdiction), but only after rejecting the position that LMRA § 301(a) conferred federal jurisdiction over those claims.

That jurisdictional determination had crucial substantive consequences. It permitted the Sixth Circuit to ignore the concerns embodied in federal law and expressed in the Secretary of Labor's determination that the extra-constitutional "90-day" Rule (and Tucker's discharge) violated LMRDA § 401(e), 29 U.S.C. § 481(e). As a result, the Court of Appeals deferred to the patently incorrect decision of the UAW Public Review Board upholding the "90-day" Rule.

Had the Sixth Circuit applied federal law, it would have been required to invalidate the "90-day" Rule and to overturn Tucker's discharge. On its face, the Rule violates an interpretive regulation issued by the Secretary of Labor—the federal officer charged with enforcing

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to suit brought by individual employee for breach of collective bargaining agreement, based on statute's reference to "[s]uits for violation of contracts between an employer and a labor organization").

the LMRDA's election provisions[18]—which proscribes union rules requiring advance declarations of candidacy, because they "discourage or paralyze any opposition to the incumbent officers." 29 C.F.R. § 452.51. This Court itself has endorsed the Secretary's view, explaining that such rules typically force a prospective candidate to make electoral decisions before "member interest in changing union leadership" has arisen and thus may "discourage candidacies and to that extent impair the general membership's freedom to oust incumbents in favor of new leadership." *Local 3489, United Steelworkers of America v. usery*, 429 U.S. 305, 311 (1977).[19]

Of course, the "90-day" Rule violates federal policy in a more obvious and fundamental way. *It applies only to candidates who challenge an incumbent officer.* This

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[18] *See* LMRDA § 402, 29 U.S.C. § 482. *See generally Dunlop v. Bachowski*, 421 U.S. 560, 571 (1975) (LMRDA "relies upon the special knowledge and discretion of the Secretary for the determination of both the probable violation [of the statute] and the probable effect" on the election).

[19] There is no way to determine how many staff candidacies the "90-day" Rule has deterred. Incumbent officers in the UAW have faced few electoral challenges since the Rule was adopted by the Administration Caucus in 1973.

In 1968, one-third of the incumbent Regional Directors (6 of 18) were challenged. In 1970, Walter Reuther's last election, one-half of the Regional Directors (9 of 18) had opposition, as did all of the UAW's top nine officers. In 1972, just before the "90-day" Rule's adoption, 7 of 18 Regional Directors' elections were contested.

Not one of the UAW's top officers has had electoral opposition in the last five convention elections since the Rule was adopted (1977, 1980, 1983, 1986, and 1989). Only 2 of 18 Regional Directors were opposed in 1977; 1 of 18 in 1980; 2 of 16 in 1983 and 1986; and 3 of 15 in 1989.

In 1986, three UAW staff members (other than Tucker) declared their candidacies three months before the Convention. Two of the three withdrew their candidacies before the Convention, and the incumbents in those Regions were thus reelected without opposition. The third staff member ultimately was endorsed by the Administration Caucus (after the incumbent withdrew) and won.

Court has invalidated far less obvious devices by which incumbents can control access to union office. *See Wirtz v. Hotel, Motel & Club Employees, Local 6*, 391 U.S. 492, 504-05 (1968) (invalidating union candidacy rule in light of ability of 'incumbent group to qualify members for elective office by a procedure not available to dissidents").

Instead of being guided by these concerns, the Court of Appeals deferred to the fundamentally incorrect decision of the UAW Public Review Board upholding the "90-day" Rule. The Sixth Circuit purported to follow a standard of deference widely adopted by the lower federal courts, but never addressed by this Court: accepting a union's interpretation of its own constitution, so long as that reading is generally "fair and reasonable."

This Court should grant this Petition in order to define the limits of judicial deference to the constitutional interpretations of an internal union body. Two obligations must constrain a federal court in this context. First, in determining what is "fair and reasonable," the reviewing court must examine federal law and policy bearing on the challenged union rule or practice. This examination must surely entail consideration of the views of the Secretary of Labor. Second, the court must not defer to a union "interpretation" which effectively overrides the plain language of the constitution—the surest guide to the intent of the union's membership.

The Court of Appeals' decision here demonstrably failed to satisfy either of these requirements. The pro-incumbent design of the "90-Day" Rule is anathema to the federal policy of free elections, as is the PRB's endorsement of the UAW's single-party system as analogous to governments elsewhere in the world. "Congress' model of democratic elections was political elections in *this* country"—in which no single party exercises monopoly control. *Hotel, Motel & Club Employees Union Local 6*, *supra*, 391 U.S. at 504 (emphasis added).

Even if applicable federal law did not so clearly condemn the "90-day" Rule, the Sixth Circuit would still have erred in defering to the PRB's decision, which ignored the express guarantees of the UAW Constitution.[20] The UAW Constitution explicitly provides that an "International Representative . . . shall be eligible as a candidate for an elective office in the International Union." Art. 14, § 5. The Constitution's unconditional guarantee of candidacy rights to International Representatives necessarily precludes a candidacy-based discharge. Whatever its origins, the "90-day" Rule is not contained in the UAW Constitution. Obviously, the exercise of a right cannot amount to the dereliction of a duty, when the right is embodied in the constitution and the duty is not. *Cf. Rankin v. McPherson*, 483 U.S. 378 (1987) (even at-will public employee may not be discharged for exercising constitutional right).

Just as periodic elections serve as a check on union officials, so do the abiding constitutional guarantees established by the union's membership. This Court should promote the strong federal interest in union democracy by reversing the Sixth Circuit's holdings, by authorizing federal judicial enforcement of union constitutions at the behest of union members, and by insuring that those charters are interpreted in light of federal law and the expressed intent of the membership.

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[20] This error brought the Sixth Circuit into conflict with the Eleventh Circuit, which has held that the "plain language of [a union's] [c]onstitution must be followed by both the union and the court." *Local 317, National Post Office Mail Handlers v. National Post Office Mail Handlers*, 696 F.2d 1300, 1302 (11th Cir. 1983).

CONCLUSION

For each of the reasons stated, the Petition for Writ of Certiorari should be granted, and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 89-1721

JERRY TUCKER,
Plaintiff-Appellant,

v.

OWEN BIEBER, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan

Decided and Filed April 13, 1990

Before: JONES and MILBURN, Circuit Judges, and BELL, District Judge.*

MILBURN, Circuit Judge, Plaintiff-appellant Jerry Tucker was discharged from his appointed position on the staff of defendant-appellee United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW") on May 12, 1986, four days after he an-

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* Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

nounced his candidacy for Director of UAW Region 5 and a seat on the union's International Executive Board. Defendant-appellee UAW President Owen Bieber ordered Tucker's discharge based upon the union's "ninety-day rule," which requires appointed staff personnel to announce their candidacies and take unpaid leaves of absence at least ninety days before scheduled union elections. Tucker appeals the summary judgment granted by the district court in favor of the defendants on the ground that his discharge did not violate the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531, or other federal labor law provisions. For the reasons that follow, we AFFIRM.

I.

A.

Tucker initiated this action by filing a complaint on September 30, 1986, seeking reinstatement, back pay and damages. His complaint alleged five separate grounds for recovery; *viz.*, Count I alleged violation of Title I of the LMRDA, Counts II and III alleged his termination violated the UAW Constitution and his contract rights as a union employee, and Counts IV and V asserted common law tort claims.

Shortly before Tucker filed this action, United States Secretary of Labor William Brock filed several actions in the district court challenging the validity of the UAW Region 5 election held in June 1986 and Tucker's termination. The secretary alleged that both the improprieties in the election and the ninety-day rule violated various sections of the LMRDA. Tucker intervened in the Secretary's actions, but maintained his private action against Bieber and the UAW separately. *See Brock v. International Union, UAW*, 682 F. Supp. 1415, 1420-21 (E.D. Mich. 1988).

On March 30, 1988, the district court determined that the Region 5 election had violated the LMRDA and or-

dered a rerun election. *Brock*, 682 F. Supp. at 1428-33.[1] Although Tucker and the Secretary both urged the district court to declare the ninety-day rule invalid, it found that the rule was "a reasonable restriction on candidacy if . . . the restriction is contained in the UAW's Constitution or bylaws." *Id. Brock*, 682 F. Supp. at 1426. The district court then dismissed the challenge to the rule as moot because of the relief it granted on other claims.[2]

Tucker and the defendants in this case filed cross-motions for summary judgment in February and March of 1987. In an opinion issued January 19, 1989, the district court denied Tucker's motion and entered summary judgment on Counts I, II and III in favor of the defendants. The district court then dismissed Counts IV and V—the common law tort claims—for lack of federal jurisdiction.

On January 26, 1989, Tucker moved the district court to alter and vacate the judgment based upon the United States Supreme Court decision in *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639 (1989), which was issued one day before the district court entered summary judgment in favor of the defendants. On May 18, 1989, the district court denied Tucker's motion to alter or amend.

B.

Tucker joined the UAW in 1960. In 1984, Region 5 Director Ken Worley appointed Tucker to the position of assistant regional director.[3] The position of assistant

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[1] Tucker won the rerun election, which was held on September 2, 1988. He was defeated in his bid for reelection in June 1989.

[2] On appeal, Tucker and the Secretary urged us to reverse the district court and declare the ninety-day rule invalid. We found the issues and appeal had become moot, vacated the judgment of the district court, and remanded the case with instructions to dismiss the complaints. *Brock v. International Union, UAW*, 889 F.2d 685 (6th Cir. 1989).

[3] Region 5 encompasses the southwestern United States.

regional director is the senior political appointment within the UAW's staff system.

In 1985, some UAW members who were dissatisfied with their union's leadership organized a coalition known as "New Directions." In May 1986, members of the New Directions movement urged Tucker to challenge Worley for the Region 5 directorship at the UAW international convention, which was scheduled to be held in June 1986.[4]

Tucker announced his candidacy for the regional directorship on May 8, 1986, *less than one month before the convention.* Tucker asked Worley for a leave of absence, but his request was denied. Instead, on Bieber's order, Tucker was discharged from his staff position on May 13, 1986. The stated reason for Tucker's termination was his violation of the ninety-day rule. Tucker was one of four UAW staff members to challenge for regional directorships in the 1986 election. He was the only one of the four to violate the ninety-day rule, and he was the only one terminated from his appointed position.

Tucker's termination did not affect his eligibility to run for the regional directorship, but it deprived him of the credentials necessary to gain access to the convention floor. In the election, Worley defeated Tucker by a margin of less than one vote, 324.557 to 324.415.[5] Tucker challenged the election in a letter to Bieber on June 5, 1986. On June 6, 1986, the convention credentials committee considered Tucker's complaint, rejected it, and certified Worley's election victory.

Tucker then filed a complaint with the Secretary of Labor about the election. After an investigation, the Sec-

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[4] The director of Region 5 is elected every three years at the international convention by the vote of delegates selected from UAW locals within the region. The director serves on the UAW's International Executive Board, the highest governing body of the union.

[5] UAW delegates vote with fractional votes based upon the size of the local they represent.

retary initiated the actions against the UAW discussed above which led the district court to overturn the 1986 convention election. A rerun election was held in September 1988, and Tucker defeated Worley to become Region 5 director.

Like Tucker, Gary Brandt, an appointed UAW staff member in Region 2, challenged his regional director in the 1986 election. Unlike Tucker, Brandt complied with the ninety-day rule, but then withdrew from the race. The Region 2 director was reelected, and Brandt was transferred from Cleveland to Detroit, pursuant to that portion of the ninety-day rule that requires unsuccessful challengers to accept a transfer after the election. Brandt challenged the rule on the grounds that (1) it impermissibly burdened challengers by requiring them to forego ninety days' wages before the election and accept a transfer if they lost, and (2) the rule was invalid because it was never formally incorporated into the UAW Constitution. Brandt challenged the rule administratively, and his appeal eventually reached the Public Review Board ("PRB"), an independent panel that decides disputes arising from the UAW's Constitution.

In a decision issued August 28, 1987, the PRB upheld the rule as a properly adopted, reasonable regulation of the UAW's appointed staff members. *Brandt v. UAW*, PRB Case No. 787 (August 28, 1987) ("*Brandt I*"). The PRB agreed to reconsider Brandt's appeal and allow Tucker to appear as an amicus. The PRB reaffirmed its prior decision, deciding that the rule was not invalid for failure to be incorporated into the union's constitution when the evidence showed it was a well-known, uniform union standard. *Brandt v. UAW*, PRB Case No. 787 II (April 22, 1988) ("*Brandt II*").

In this case, the district court found that the PRB's ruling on the ninety-day rule was fair and reasonable and adopted it. The district court also found that Title I

did not give Tucker a legal entitlement to an appointed position on the union staff, and his termination did not affect his membership rights. The district court concluded that the ninety-day rule "provided a legitimate basis for Tucker's discharge and was not a deliberate attempt to stifle dissent within the Union."

Turning to Tucker's other claims, the district court found that section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, does not confer jurisdiction upon federal courts over actions brought by individual union members for a union's alleged violations of its constitution. *See Trail v. International Bhd. of Teamsters*, 542 F.2d 961, 968 (6th Cir. 1976). The district court chose to exercise pendent jurisdiction over Counts II and III, and found that the union did not breach its constitution or Tucker's employment rights.

The principal issues on appeal are whether the district court erred in deciding (1) that the ninety-day rule did not violate the LMRDA, and (2) that the UAW did not violate its constitution or the conditions of Tucker's employment in discharging him.

II.

A.

In this appeal of a district court's grant of summary judgment on the defendants' cross-motions for summary judgment, our role is identical to that of the district court. *Hand v. Central Transport, Inc.*, 779 F.2d 8, 10 (6th Cir. 1985) (per curiam). Our review of the district court's decision in this case is de novo since only questions of law are involved in this appeal. *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 109 S. Ct. 196 (1988).

In this appeal, Tucker also challenges the Public Review Board's decision upholding the ninety-day rule. We recently held that "[c]ourts are reluctant to substitute

their judgment for that of union officials in the interpretation of the union's constitution, and will interfere only where the official's interpretation is not fair or reasonable." *Millwright Local No. 1079 v. United Bhd. of Carpenters and Joiners*, 878 F.2d 960, 962, (6th Cir.), *cert. denied*, 110 S. Ct. 407 (1989) (quoting *Vestal v. Hoffa*, 451 F.2d at 706, 709 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972)).

B.

"Title I of the LMRDA and specifically section 101, 29 U.S.C. § 411, is the 'Bill of Rights' for union members." *Knisley v. Teamsters Local 654*, 844 F.2d 387, 389 (6th Cir. 1988) (per curiam). Title I protects rank and file union members who speak out against union leaders or who seek elective union offices. *United Steelworkers of America v. Sadlowski*, 457 U.S. 102, 109 (1982). It guarantees every union member the rights of free speech and assembly and equal voting rights. Title I also provides for private enforcement actions to further the primary objective of the LMRDA; *viz.*, "ensuring that unions [are] democratically governed and responsive to the will of their memberships." *Sheet Metal Workers' Int'l Ass'n v. Lynn*, 109 S. Ct. 639, 643 (1989) (quoting *Finnegan v. Leu*, 456 U.S. 431, 436 (1983)).

Title I protects those rights that are fundamental to union membership—"membership rights," as opposed to any "job rights" that might arise from a particular union member's employment on the union's appointed staff. Title I did not create "a system of job security or tenure for appointed union employees." *Finnegan*, 456 U.S. at 438. As we have explained:

> "Any union *member* is certainly entitled to disagree with the union's policy. *However, when persons chosen by the union leadership are appointed* to effectuate that policy, elected union officers are investing the appointee with the trust of the member-

> ship. When that trust is lost, not only will the appointee be subject to removal; but the elected official has placed his office in jeopardy also. *For that reason, the courts have been reluctant to interfere with the right of elected union officers to select their own administrators.*

Cehaich v. International Union, UAW, 710 F.2d 234, 239 (6th Cir. 1983) (footnote omitted) (emphasis added).

In this type of Title I dispute, we look to *Finnegan* and *Sheet Metal Workers* for guidance. In *Finnegan*, a newly elected union president discharged the union's appointed business agents, who had been appointed by the preceding president and who had campaigned against the new president in the election. The Court acknowledged that their discharge had a chilling effect on their free speech rights. The Court held, however, that Title I rights are not absolute and do "not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Finnegan*, 456 U.S. at 441 (footnote omitted). The Court also held that the agents "held a dual status as both employees and members of the [u]nion," *id.* at 437, and in the absence of any deliberate scheme to suppress speech, the discharge of appointed staff members affected only their job rights and not any membership rights that were protected by the LMRDA. *Id.* at 440-441; *see also Cehaich*, 710 F.2d at 238.

In *Sheet Metal Workers*, the union's national administration took control of a local and installed a trustee, who fired one of the local's elected business agents in retaliation for his opposition to the trustee's plan to increase dues. The Court held that the discharge of an elected official infringed upon the Title I free speech rights of *both* the business agent *and* the entire local membership, while also depriving the members of their

voting rights by denying them the representative of their choice. *Sheet Metal Workers*, 109 S. Ct. at 644-45. This type of dictatorial conduct "is precisely what Congress sought to prevent when it passed the LMRDA." *Id.* at 645.

Tucker argues that his appeal is controlled, in his favor, by *Sheet Metal Workers*, not *Finnegan*. He argues that the rationale of *Sheet Metal Workers* applies equally to *candidates* for elective office because of the potential chilling effects of discharging appointees who decide to exercise their right to run for office. Essentially, he characterizes candidates as nearly elected officials, and then argues that for Title I purposes, being nearly elected is the same as being elected. We are not persuaded by Tucker's arguments.

It is undisputed in this case that four appointees were candidates in the 1986 UAW elections. Tucker was the only one of the four who ignored the ninety-day rule, and was the only one of the four to be terminated. Tucker's termination, however, did not prevent him from running for office. Once he lost his staff job, he lacked the credentials necessary to gain access to the convention floor. However, there is no evidence that he endured any more campaign hardships than any other candidate from the rank and file, nor is there any evidence that Tucker was inhibited from speaking or that the membership was hindered in voting for him. Indeed, he nearly defeated Worley in the 1986 election. At most, Tucker endured an indirect infringement no more significant than what the discharged appointees experienced in *Finnegan*. This case also lacks the egregious facts present in *Sheet Metal Workers*. Thus, absent some special circumstances, it does not appear that Tucker's discharge infringed upon his Title I rights in any significant manner.

Tucker claims that the special circumstances of his case are that he was a candidate in a campaign. As a

candidate, he argues, he required the ability to exercise his free speech rights most vigorously, and speech must flow at its freest if the membership is to benefit from a campaign. Thus, he concludes that once he became a candidate, the free speech and voting rights concerns of *Sheet Metal Workers* triggered an extension of Title I to protect his right to keep his appointed staff position. We disagree.

First, we cannot ignore that this case involves "the ability of an elected union president to select his own administrators . . ." *Finnegan*, 456 U.S. at 441. This interest was absent in *Sheet Metal Workers*. Where it is present, we must consider it to determine how it balances against the asserted Title I rights. *Finnegan*, 456 U.S. at 440-41.

Second, the Court emphasized that the distinguishing characteristic in *Sheet Metal Workers* was the fact that the discharged business agent had been elected to his office. 109 S. Ct. at 644-45. His dismissal not only chilled his Title I rights, but also had the immediate effect of silencing the entire local membership's speech, suspending its voting rights, and depriving the local of leadership at a crucial time in its existence. *Id.* at 645. In contrast, the voting and speech concerns that Tucker raises focus on himself, are speculative at best, and appear to be completely baseless when it is remembered that despite Tucker's termination, a vigorous campaign still occurred.

In *Finnegan*, the Court recognized that appointees may hold the dual status of union employee and union member. 456 U.S. at 437. Tucker urges us to recognize a third category—candidate—and stretch Title I to protect his "right" to keep his appointed job while he is a candidate, in complete disregard of the elected union administration's freedom to select and maintain a staff that will carry out its policies. We find no merit in this contention. Clearly, Tucker's discharge cost him his ap-

pointed staff position. However, as we explained in *Cehaich*, that price alone does not amount to a Title I violation as an appointee's discharge affects only his role as an appointee, not his role as a union member. 710 F.2d at 238-39. Title I ensures that every union member may challenge the union leadership; it does not guarantee that those who challenge it will be appointed to or remain on the elected leadership's staff.

Tucker argues that after *Sheet Metal Workers*, the determination of whether his discharge violates Title I must be made in light of the LMRDA's objective of ensuring that unions are governed democratically. Were this the sole criteria, Tucker's claim would still fail, for despite his discharge the union remained democratically governed. Though Tucker seems incapable of remembering it, he nearly defeated Worley in the election, and another challenging appointee won his race. In sum, there is no evidence in this case that Tucker's discharge suspended the democratic governance of the UAW.[6]

C.

The union's stated reason for discharging Tucker was his violation of the ninety-day rule. Tucker attacks the rule as being invalid because it was never incorporated into the UAW Constitution and it impermissibly burdens challengers. The district court reviewed the PRB's recent decision approving the rule, found that decision to be fair and reasonable and adopted it. We agree.

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[6] We also point out that after *Sheet Metal Workers*, as before, the basic objective of the LMRDA is not only to ensure that unions are democratically governed, but also to ensure that unions are "responsive to the will of the union membership as expressed in open, periodic elections." *Sheet Metal Workers*, 109 S. Ct. at 644 (quoting *Finnegan*, 456 U.S. at 441). The basic objective would be thwarted if the elected union leadership were forced to retain appointed members that were "disloyal." *Id.* at 644.

We note at the outset that federal labor regulations permit unions to prohibit appointed employees from running for office. 29 C.F.R. § 452.48 (1989). We also note that the UAW adopted the ninety-day rule to promote democratic competition within the union's structure by assuring appointed staff members that they can retain their appointed staff positions if they fail to be elected to office. *See Robertson v. International Union, UAW*, PRB Case No. 225 (1971). While the rule was never adopted in a formal, recorded meeting of the UAW International Executive Board, the PRB decided that because of the manner in which the union is governed, and because of the broad dissemination of the ninety-day rule, it was the type of recognized, written uniform union policy the board had called for in *Robertson*.

On appeal, Tucker argues that in *Robertson* the PRB *required* the UAW to incorporate the ninety-day rule in its constitution to protect appointees' candidacy rights and because it limits members' candidacy rights. We disagree.

First, as this case makes clear, the ninety-day rule does not affect the right of any union member, staff appointee or rank-and-file member, to run for office. Tucker ignored the rule, ran for office and nearly won.

Second, like the PRB, we do not interpret *Robertson* to require the UAW to incorporate the ninety-day rule into its constitution. The PRB's concern in *Robertson* was that the UAW had no written policy and gave appointed employees no indication of what to expect if they ran for office. The PRB decided in *Brandt I* and *Brandt II* that the ninety-day rule, as applied to Tucker, satisfied the requirements of the *Robertson* decision, and we find the board's reading of its prior decision to be fair and reasonable. Tucker also attacks the rule on the ground that it impermissibly burdens challengers by requiring them to take a ninety-day leave of absence,

forego between $10,000 and $15,000 in lost wages, and if they lose, accept reassignment to another city. He argues that the rule effectively muzzles members' dissent by making it too expensive for them to run for office.

In *Brandt II*, the PRB found these arguments fouled the issue by confusing membership rights and job rights.

> The issue, however, is not relative advantage and disadvantage. The [UAW] Constitution does not require, in terms of the currently popular idiom, a level playing field. We have long recognized the advantages which incumbency provides, and have consistently ruled that such advantages do not make the electoral process *per se* unfair.

Brandt II, at J.A. 267 (footnote omitted).

The PRB found that Brandt sought to enforce "the right to continue in his post during the campaign and to be free from transfer if his campaign is unsuccessful." *Id.* The board further found that this "right" was not a membership right, and the UAW's failure to protect a nonexistent right was not an invalid action, as "[n]othing in the Constitution specifically guarantees unchanged job rights to an International representative during his electoral challenge to an incumbent." *Id.* at 267-68.

Tucker argues on appeal that *Brandt II* dealt only with Brandt's objection to a post-election transfer and is not applicable to this case. We disagree, as Brandt objected to being forced to take an unpaid leave of absence and accept a transfer to another city. Tucker's argument is misplaced given that he intervened in *Brandt II* as an amicus because it hinged on issues identical to those in this case. We find the PRB's analysis of the ninety-day rule was neither unfair nor unreasonable, and, consequently, we will not substitute our judgment of union policy over the board's.

D.

In Counts II and III, Tucker alleges that the UAW breached its constitution and his employment contract when it discharged him. He argues that the constitution incorporates the right to retain an appointed staff job while running for office, and that he did not engage in any conduct that would justify discharge under the terms of his employment agreement.

The district court first held that it lacked jurisdiction over Tucker's "constitutional" claim because the LMRDA does not confer jurisdiction upon federal courts to adjudicate union members' actions to enforce union constitutions. *See Trail v. International Bhd. of Teamsters*, 542 F.2d 961, 968 (6th Cir. 1976). The district court then chose to exercise pendent jurisdiction over both claims and dismissed them after concluding that the union had not engaged in any wrongful conduct.

While courts have split on the issue, *Trail* remains the law in this circuit, and we hold that the district court was correct in deciding that section 301 of the LMRDA does not confer jurisdiction for an individual union member's action to enforce a union constitution. We further hold that the district court did not abuse its discretion in exercising pendent jurisdiction over Counts II and III, and we agree with the district court that Tucker has failed to show that the union breached its constitution or Tucker's employment contract.

Tucker argues that because the UAW Constitution guarantees every union member the right to run for office, then "by its terms," the constitution guarantees that Tucker could continue to work for Worley after he announced he was challenging Worley for his job. Tucker asserts this "right" must be incorporated into the constitution. The UAW Constitution makes no mention of special candidacy rights, either for rank-and-file members or appointees. Moreover, Tucker's asserted right

conflicts with the freedom of the elected union leaders to maintain a loyal staff that will faithfully execute their policies. We hold that Tucker's claim of a constitutional violation is meritless.

Tucker argues that as an appointed employee, he could be discharged only for (1) dereliction of duty, (2) dishonesty, or (3) union need to conserve finances. He insists that exercising the right to run for office cannot be construed to be a "dereliction of duty." In stating this proposition, however, Tucker conveniently ignores the fact that he exercised his right to run for office in direct violation of established union policy. We agree with the PRB and the district court that Tucker's conduct was a legitimate basis for discharge.

After rejecting Tucker's Title I claim in Count I, and dismissing Counts II and III, the district court dismissed the two remaining pendent claims for lack of jurisdiction. In light of our disposition of the preceding portions of Tucker's appeal, we find the district court did not abuse its discretion in dismising Counts IV and V.

III.

We hold that Tucker's asserted "right" to retain his appointed position on the union staff while he challenged the union leadership for office does not exist under Title I of the LMRDA. We further hold that the UAW did not breach its constitution or conditions of Tucker's employment in discharging him for violating the ninety-day rule. For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 86-4164

HON. RICHARD F. SUHRHEINRICH

JERRY TUCKER,

Plaintiff,

v.

OWEN BIEBER and the INTERNATIONAL UNION UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Defendants.

MEMORANDUM OPINION AND ORDER

The Court declines to alter and vacate the judgment in this case or to order rehearing or reconsideration based upon plaintiff Jerry Tucker's ("Tucker") submission of *Sheet Metal Workers International Ass'n v. Lynn*, 488 U.S. ——, 109 S.Ct. 1739, 102 L.Ed.2d 700 (January 18, 1989). The Court has reviewed the decision and concludes that *Lynn* does not dictate a contrary result. Rather, the Court finds that the holding in *Lynn* reinforces ~~the~~ Court's judgment.

In *Lynn*, the Supreme Court addressed the issue of whether the removal of an elected business agent, in retaliation for statements he made at a union meeting in opposition to a dues increase sought by the union trustee, violated Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.* In

affirming the Ninth Circuit Court of Appeals,[1] the *Lynn* court held that the discharge violated the free speech provision of Title I, 29 U.S.C. § 411(a)(2). The Court rejected the Sheet Metal Workers' argument that Lynn's status as an elected, rather than an appointed official was immaterial, and that loss of his union employment could not amount to a Title I violation. The *Lynn* court refused, however, to characterize the case as indistinguishable from *Finnegan*.[2] The Court did acknowledge that, in *Finnegan*, as in *Lynn*:

> [T]he agents had been forced to choose between their rights and their jobs. . . . This was so even though the business agents were not actually prevented from exercising their Title I rights. The same is true here.

488 U.S. at ——, 102 L.Ed.2d at 709 (citation omitted). Despite the similarity, the Court found that the contrast

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[1] *Lynn v. Sheet Metal Workers International Ass'n*, 804 F.2d 1472 (9th Cir. 1986).

[2] Earlier in the opinion the Court was careful to circumscribe the crux of the *Finnegan* decision; namely, that union democracy is directly served by allowing an *elected* union official to remove an *appointed* staff employee.

> [In *Finnegan*] [w]e . . . held that the business agents could not establish a violation of § 102 because their claims were inconsistent with the LMRDA's "overriding objective" of democratic union governance. 456 U.S. at 441. *Permitting a victorious candidate to appoint his own staff did not frustrate that objective; rather it ensured a union's "responsiveness to the mandate of the union election." Ibid. We thus concluded that the LMRDA did not "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." Ibid.* In rejecting the business agents' claims, *we did not consider* whether the retaliatory removal of an *elected* official violates the LMRDA and, if so, whether it is significant that the removal is carried out under a validly imposed trusteeship. It is to these issues we now turn.

488 U.S. at —, 109 S.Ct. at ——; 102 L.Ed.2d at 708 (emphasis added).

between the removal of an appointed official and an elected official distinguished the case from *Finnegan* and dictated a different result.

> This is not, of course, the end of the analysis. Whether such interference with Title I rights gives rise to a cause of action under § 102 must be judged by reference to the LMRDA's basic objective: "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan*, 456 U.S., at 441. In *Finnegan*, this goal was furthered when the newly elected union president discharged the appointed staff of the ousted incumbent. *Indeed, the basis for the Finnegan holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs. While such patronage-related discharges had some chilling effect on the free speech rights of the business agents, we found this concern outweighed by the need to vindicate the democratic choice made by the union electorate.*
>
> *The consequences of the removal of an elected official are much different.* To begin with, when an elected official like Lynn is removed from his post, the union members are denied the representative of their choice. Indeed, Lynn's removal deprived the membership of his leadership, knowledge and advice at a critical time for the Local. His removal, therefore, hardly was "an integral part of ensuring a union administration's responsiveness to the mandate of the union election." *Ibid.*; see also *Wirtz v. Hotel Employees*, 391 U.S. 492, 497 (1968).

488 U.S. at ——, 109 S.Ct. at ——; 102 L.Ed.2d at 709-10 (emphasis supplied).

Thus, in *Lynn* the court did not refute the fact that removal has an impact, or chilling effect on the free speech rights of appointed officials. It did, however, find "this concern outweighed by the need to vindicate the democratic choice made by the union electorate." 488 U.S. at ——; 109 S.Ct. at ——; 102 L.Ed.2d at 710. By contrast, it stated that when an elected official is discharged the potential chilling effect is more pronounced on both the official and the members who voted for him. *Id.*

A careful reading of *Lynn* reveals that Lynn not only affirms *Finnegan* but in addition decides the question left upon by *Finnegan*—whether a retaliatory removal of an elected official violates the LMRDA. Moreover, the Court finds that the instant opinion fully comports with the Supreme Court's pronouncements in both *Finnegan* and *Lynn*. Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to alter and vacate the judgment or to order rehearing or reconsideration is DENIED.

/s/ Richard F. Suhrheinrich
RICHARD F. SUHRHEINRICH
United States District Judge

Dated: May 18, 1989

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 86-4164

HON. RICHARD F. SUHRHEINRICH

JERRY TUCKER,

Plaintiff,

v.

OWEN BIEBER

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on plaintiff Jerry Tucker's ("Tucker") motion for partial summary judgment and defendants Owen F. Bieber's ("Bieber") and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America's ("UAW") cross-motions for summary judgment. Pursuant to Local Rule 17(1)(2), the Court will make a decision without oral argument.

I.

The instant case is a companion to three other cases recently decided by the Court. See *Brock v. International Union, United Automobile Aerospace and Agricultural*

Implement Workers of America, 682 F.Supp. 1415 (E.D. Mich. 1988).[1] The suit presently before the Court is styled as a Title I cause of action. The Court will set forth only those facts necessary to resolving the instant dispute and incorporates by reference its earlier opinion.

Tucker is, and has been since 1960, a member in good standing of the UAW. From 1970 until his discharge in 1986, plaintiff was employed as an International Representative of the UAW. In 1984 Ken Worley, the incumbent Regional Director for Region 5, appointed Tucker to the position of Assistant Regional Director. The position is the senior political appointment in the Southwestern United States. As assistant director, Tucker was also the senior administrator, appointed to implement the policies of the elected officials.

In 1985 various local union officials in Region 5 organized a coalition which has since become known as the "New Directions" movement. In January of 1986, the group called for a March 1986 meeting of local union leaders (the UAW Region 5 Leadership Conference), to be held in Oklahoma City, Oklahoma. The meeting was announced in a letter which was sent to all Region 5 locals and to defendant Bieber. The letter also criticized the official leadership of the UAW International and its policies. The Oklahoma City meeting was held as planned, and the participants adopted a statement which suggested alternatives to the UAW's International collective bargaining policies and demanded greater control by members over UAW affairs.

On May 5, 1986 local union officials and other UAW members associated with the "New Directions" movement and who had been selected as delegates to the upcom-

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[1] That opinion consolidated three suits filed under Title IV of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 481 *et seq.* by the Secretary of Labor on behalf of plaintiff Tucker. The cases include Civil Action Nos. 86-3859, 86-4827, and 86-5007.

ing UAW International Convention, urged Tucker to become a candidate for election as Director of Region 5, the position then held by Ken Worley. The Director of Region 5 is elected every three years at the convention by the vote of delegates selected from UAW local unions in the Region. The Director serves on the UAW's International Executive Board ("IEB"), the highest governing body of the union, which is composed of Directors from the UAW's 18 regions, along with the UAW International president, secretary-treasurer, and six vice-presidents.

Tucker announced his candidacy for the regional director position on May 8, 1986, less than one month before that election, and publicly identified himself with the "New Directions" movement. By this declaration Tucker acted in contravention to a policy (hereinafter "90-day rule") requiring appointed UAW staff members who oppose an elected incumbent to declare their candidacy at least 90 days before the election and to take an unpaid leave of absence from their staff position for that length of time. Although Tucker asked for a leave of absence after he declared his candidacy, the leave was denied him. He was instead discharged from his staff position at Owen Bieber's behest on May 12, 1986. The stated reason for Tucker's termination was his violation of the 90-day rule.

As a result of the discharge, Tucker was denied access to the floor of the convention. Thus, he was unable to campaign for office at the convention. Additionally, the fact of his discharge was common knowledge among the delegates. Tucker was not, however, prohibited from running for union office.

The Region 5 Regional Director election took place at the 1986 UAW convention in Anaheim, California. The vote for Region 5 Regional Director was taken in roll call fashion, with the delegates from each local being

polled separately. After the votes were tallied, UAW officials declared Ken Worley the winner.

Invoking the LMRDA and the UAW Constitution, Tucker attacked his discharge and the conduct of the Region 5 election. Based on improprieties in delegate-selection and the unlawful use of union facilities to promote the candidacy of Tucker's opponent, the Court, in its opinion dated March 30, 1988, overturned the Region 5 election and ordered that it be rerun.[2] In the second election held in September 1988, Tucker emerged the victor.

In the March 30, 1988 opinion, the Court reserved its decision on the issue of Tucker's discharge, pending a decision by the Public Review Board ("PRB" or "Board") on an appeal[3] addressing virtually identical issues as those presented by Tucker, and invited the parties to submit supplementary materials. The PRB issued its decision on reconsideration in *Brandt* on April 22, 1988.

Remaining before the Court then is Tucker's private cause of action. In his complaint, Tucker alleges his termination from employment by the UAW after he declared his candidacy for union office violated his rights under Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), (29 U.S.C. § 401 *et seq.*) (Count I); violated his rights as a union member of free speech and to be a candidate for union office contained in the UAW Constitution and Ethical Practices Code (Count II); and violated his rights as a union employee to be terminated only for certain specified reasons and then subject to the approval of the Union's Executive Board (Count III). Count IV raises a claim for wrongful discharge contrary to the public policy

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[2] See *Brock v. UAW, supra.*

[3] See *Brandt v. UAW*, UAW PRB No. 787 II (April 22, 1988).

of Michigan; and Count V alleges intentional infliction of emotional distress as a result of the defendants' conduct.

The facts in the instant case are largely undisputed. The critical inquiry is the origin, effect and legality of the 90-day rule,[4] the purported justification for Tucker's discharge. Tucker contends that as a matter of law this justification, as applied to plaintiff's LMRDA claims as well as his union-constitution based claims, is without merit. Tucker maintains that his discharge was in reprisal for his candidacy and that it was part of a deliberate effort by the UAW to stifle dissent within the Union. This behavior, he asserts, violated his free speech rights as guaranteed by Title I of the LMRDA; and his right to free speech, due process and employment as guaranteed by the UAW charters. Tucker contends that the 90-day rule is inconsistent with the UAW Constitution and asserts that the rule was never properly adopted by the UAW as an institution but remains a disciplinary measure developed and enforced *ultra vires* by members of the Union's controlling political party, the Administration Caucus, and their union officers.

II.

JURISDICTION

As an initial matter, the UAW asserts that Tucker's self-styled Title I suit is preempted by Title IV of the LMRDA. Title I, 29 U.S.C. § 411 *et seq.*, contains the "Bill of Rights" for union members. The Act guarantees "equal rights and privileges" to nominate and vote

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[4] The 90-day rule, in its current form provides that:

> A staff member who decides to run against an officer or Regional Director must make his intentions known and request a leave of absence at least 90 days prior to the convention. Such staff member will be given a leave of absence and be subject to reassignment in the event he is an unsuccessful candidate.

for candidates, *id.* at § 411(a)(1); as well as freedom of speech and assembly. *Id.* at § 411(a)(2). Section 102 of the LMRDA provides that "[a]ny person whose rights secured by the provisions of this subchapter have been infringed . . .," may bring an action in the appropriate district court to seek such relief as may be appropriate to redress a violation of these rights. 29 U.S.C. § 412.

Title IV of the LMRDA, 29 U.S.C. § 481 *et seq.*, specifically regulates the election of union officers on the local, national and international levels and sets forth the terms of office and election procedures. *BLE International Reform Committee v. Sytsma*, 802 F.2d 180, 184-85 (6th Cir. 1986). In *Calhoon v. Harvey*, 379 U.S. 134 (1964), the Supreme Court stated that Title IV:

> sets up a statutory scheme governing the election of union officers, fixing the terms during which they hold office, requiring that elections be by secret ballot, regulating the handling of campaign literature, requiring a reasonable opportunity for the nomination of candidates, authorizing unions to fix "reasonable qualifications uniformly imposed" for candidates, and attempting to guarantee fair union elections in which all the members are allowed to participate.

379 U.S. at 140; *Local No. 82 Furniture and Piano Moving, Furniture Moving Drivers, Helpers, Warehousemen and Packers v. Crowley*, 467 U.S. 526, 539, *reh'g denied* 468 U.S. 1224 (1984). In essence, "Title IV's special function in furthering the overall goals of the LMRDA is to insure 'free and democratic' elections." *Wirtz v. Glass Bottle Blowers Ass'n*, 389 U.S. 463, 470 (1968); *Crowley*, 467 U.S. at 339.

Title IV, in contrast to Title I, vests jurisdiction to enforce these provisions in the Secretary of Labor. It allows a union member to file a complaint with the Sec-

retary after fulfilling certain procedural prerequisites. 29 U.S.C. § 482(a). The Secretary is then required to investigate the complaint and is obligated to file a suit in federal district court to have the election set aside if "he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied. . . ." *Id.* at § 482(b). Also included in Title IV is an exclusivity provision which provides in pertinent part:

> Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

29 U.S.C. § 483. See also *Knisley v. Teamsters Local 654*, 844 F.2d 387 (6th Cir. 1988).

While it is evident that Title I and Title IV protect many of the same rights, *Crowley*, 467 U.S. at 539, "the exclusivity provision included in § 403 of Title IV [29 U.S.C. § 483] plainly bars Title I [section 411] relief when an individual union member challenges the validity of an election that has already been completed." *Crowley*, 467 U.S. 541 (footnote omitted). On the other hand, the Supreme Court stated further in *Crowley* that the exclusivity provision of Title IV may not bar post-election relief for Title I claims or other actions that do not directly challenge the validity of an election already conducted. *Id.* at 541 n.16. Accord, *Murphy v. International Union of Operating Engineers*, 774 F.2d 114, 130 (6th Cir. 1985).

The instant suit is not one which challenges an election already conducted, but rather is one which contests a discharge that occurred prior to the election. As a remedy, the suit seeks reinstatement, back pay and other monetary damages rather than a rerun election. Thus, the

Court finds that plaintiff's Title I claim is not preempted by Title IV. The Court therefore has jurisdiction.

III.

This leaves the Court to determine whether Tucker has stated a Title I violation. For the reasons set forth below, the Court concludes that Tucker has failed to create any genuine issue of material fact to preclude summary judgment. The Court's analysis necessarily begins with the leading case in this area, *Finnegan v. Leu*, 456 U.S. 431 (1982). In *Finnegan* the Supreme Court held that Title I does not prohibit a newly-elected union leader from discharging union officers who opposed his candidacy in an intraunion election. *Id.* at 441. The discharged employees had been business agents appointed by the defeated incumbent. The business agents did not, however, lose their union membership. *Id.* at 433-34. The Court stated that the removal of the officials from office therefore constituted only an indirect interference with their membership rights. *Id.* at 440. The Court noted that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." *Id.* at 441. The exercise of this freedom furthers the primary objective of the LMRDA "to ensure that unions would be democratically governed, and responsive to the will of the union membership in open, periodic elections." *Id.* at 441. Thus, *Finnegan* established the proposition that an elected official's power to select appointed administrators who reflect his views furthers, rather than confounds, the growth of union democracy as intended by the LMRDA; and that a union leader is not precluded by the LMRDA from discharging a union official for political reasons so long as that official's status as a union member is not affected.

Finnegan has been expressly followed in the Sixth Circuit. See *Cehaich v. International Union, UAW*, 710

F.2d 234 (6th Cir. 1983). *Cehaich* involved the dismissal of an unpaid appointed benefits representative. As benefits representative, Cehaich was responsible for counseling and assisting retirees, beneficiaries and surviving spouses regarding benefit problems under pension, insurance and subagreements. At a national convention attended by elected and appointed officials to discuss a tentative collective bargaining agreement with General Motors, Cehaich became part of a dissident caucus which opposed the tentative agreement. He was thereafter discharged from his union staff position for distributing literature criticizing the proposed agreement and the national caucus. *Id.* at 236. Cehaich filed suit in federal district court alleging various violations of the LMRDA. The Sixth Circuit noted that Cehaich, like the plaintiff in *Finnegan*, held dual status as an officer and member of the union, that these were distinct roles, and that union action affecting one did not necessarily affect the other. *Id.* at 238. Relying on *Finnegan*, the Court held that Cehaich had failed to state a cognizable claim since Cehaich's dismissal from union office did not impinge upon his rights as a member of the union. *Id.* The Sixth Circuit reasoned that:

> Any union *member* is certainly entitled to disagree with the union's policy. However, when persons chosen by the union leadership are appointed to effectuate that policy, elected union officers are investing the appointee with the trust of the membership. When that trust is lost, not only will the appointee be subject to removal, but the elected official has placed his office in jeopardy also. For that reason, the courts have been reluctant to interfere with the right of elected union officers to select their own administrators. Rather, they have recognized that the abiiity of union leaders to choose a staff with ideas compatible with their own "is an integral part

> of ensuring a union administration's responsiveness to the mandate of the union election."

710 F.2d at 239 (quoting *Finnegan*, 456 U.S. at 441) (footnote omitted) (emphasis in original).

The Supreme Court acknowledged in *Finnegan* however, that a § 102 violation may appear when the removal of an official from office is "part of a purposeful and deliberate attempt to suppress dissent within the union." 456 U.S. at 441 (citing *Schonfield v. Penza*, 477 F.2d 899 (2d Cir. 1973) (elected union officer successfully challenged his discharge by group exercising tyrannical control over the union)). See *Lynn v. Sheet Metal Workers' International Ass'n*, 804 F.2d 1472, 1477-79 (9th Cir. 1986); *Cotter v. Owens*, 753 F.2d 223, 228 (2d Cir. 1985). See also *Adams-Lundy v. Association of Professional Flight Attendants*, 731 F.2d 1154, 1158-59 (5th Cir. 1984).

Tucker argues that the firing of plaintiff, just four days after he had declared his candidacy and publicly identified himself with a political movement which had been highly critical of UAW policies, constitutes a *per se* violation of Section 101(a)(2). Plaintiff argues that the Union's reliance on the 90-day rule, which he contends is unconstitutional, evidences a deliberate attempt to stifle dissent within the Union. The Union asserts that Tucker was discharged for a legitimate reason; namely, his violation of the 90-day rule and not because he was exercising his free speech membership right. Thus, the issue revolves around the validity of the 90-day rule as a binding provision of the UAW Constitution and a legitimate ground for Tucker's termination as International Representative.

In its original decision (*Brandt I*), issued August 28, 1987, the PRB concluded that the 90-day rule had been properly adopted by the IEB pursuant to specific provisions of the UAW Constitution and is neither uncon-

stitutional nor unreasonable. It further held that the 90-day rule did not deprive Brandt, a member of the UAW's staff, of any of his Constitutional rights.[5] Brandt requested a reconsideration of that decision, asserting *inter alia*, that the PRB had erred in its assumption that the 90-day rule had been adopted by the IEB. The PRB granted Brandt's request. At or about the same time Tucker, who like Brandt had been a candidate against the incumbent Regional Director in the June 1986 elections, requested to intervene as *amicus*. Because of his obvious interest in the outcome of the *Brandt* appeal, the PRB granted Tucker *amicus* status. In its reconsideration on appeal, the PRB affirmed its earlier decision upholding the validity of the 90-day rule.[6]

In reviewing the PRB's decision, the Court notes at the outset that courts are reluctant to substitute their judgment for that of union officials in the interpretation of the union's constitution, and will not interfere unless it is unfair or unreasonable. *Vestal v. Hoffa*, 451 F.2d 706, 708 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *Newell v. International Brotherhood of Electrical Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986) (citations omitted); *Mayle v. Laborer's International Union of North America*, 678 F.Supp. 690, 696 (N.D. Ohio 1987).

In his argument on reconsideration, Brandt argued that the International Union failed to follow the directives of the PRB in a prior decision, *Robertson v. International Union, UAW*, 1 PRB 632 (1971), wherein the

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[5] In *Brandt I*, complainant was an International Representative who appealed a change in UAW assignments given him after he ran as a candidate in violation of the 90-day rule.

[6] Under Article 32 § 3(a) of the UAW Constitution, the PRB has "the authority and duty to make final and binding decisions on all cases appealed to it in accordance with Article 33 of the International Constitution, and to deal with matters related to alleged violation of any UAW ethical practices code that may be adopted by the International Union."

PRB suggested to the Union how it might proceed in the event it wished to place limitations on the right of International Representatives to seek office at the International level. In *Robertson*, the PRB recommended that some Constitutional action be taken to implement the 90-day rule. Brandt contended that instead of amending its Constitution, the union adopted a rule without the benefit of formal action by the International Executive Board. Brandt argued, as does Tucker, that the 90-day rule was nothing more than a policy adopted by a political party, the Administration Caucus, and as such has no legal status. After examining the relevant history behind the 90-day rule, including testimony from individuals involved in the adoption of the rule, the PRB stated in response:

> These are weighty arguments. Concededly no effort was made to amend the Constitution to incorporate the 90-day rule. Furthermore, it is also clear that the rule was not adopted in any formal session of the International Executive Board. The International Union concedes that there are no minutes reflecting the adoption of the Rule, although the Constitution is specific in its requirement that verbatim minutes be taken at all meetings of the International Executive Board and no formal action shall be taken in executive session.
>
> Despite the admitted force of appellant's argument, we are reluctant to adopt such a restrictive view of what does and does not constitute International Executive Board action. We cannot ignore the fact that the UAW is now, and has been for over 20 years, a one-party institution not in all respects unlike that found in many national governments in which a single political party controls the government, and the officials who formally make and administer the laws pursuant to which the country is governed are selected wholly by that party. As a

> consequence, in the UAW the lines of demarcation between party, the Administration Caucus, and the formal governing body, the International Executive Board, have become blurred, for 100% of its personnel are, and traditionally have been, members of the Administration Caucus. The Internal Procedures Committee which drafted the 90-day rule in 1973 was comprised entirely of UAW Vice Presidents and Regional Directors, all members of the International Executive Board.

PRB No. 787 II at 6.

The PRB provided that an example of this blurring of lines could be found in the language used in the letters of transmittal of the 90-day rule itself. The PRB noted that the UAW Vice-President Douglas Fraser's September 21, 1973 transmittal of the first version of the 90-day rule, is addressed to "International Executive Board Members," and that the transmitting statement reads: "Attached is the revised language of the paper adopted by the Board Caucus." Further, in September 1983 when the committee report with the reinstated rule was transmitted by President Owen Bieber to the "International Executive Board" it contained the following notation: "Attached is the revised amended language of Internal Rules adopted by the Board Caucus in its Meetings of September 14, 1981 and September 21, 1983." PRB No. 787 II at 7. The PRB found it noteworthy that the transmittals were not made to the Administration Caucus, the body Brandt claimed had adopted the 90-day rule, but to the International Executive Board, and the body which had proposed the changes, referred to as the "Board Caucus," not the "Administration Caucus." *Id.* The PRB further stated that the "Board Caucus" was not a caucus at all; but rather the Internal Procedures Committee of the International Executive Board. *Id.* The PRB found that the fact that the party and the governing body are both comprised of the same

personnel led to "this curious intermingling of terminology." *Id.*

The PRB then stated:

> For this Board to rule that the Union can act only through formal action of the International Executive Board, recorded in verbatim minutes, would be to ignore the realities of how this Union has long governed itself and would call into question a wide range and untold number of IEB actions over the years. * * * In any event, the Union and its staff have been operating under the 90-day rule, with the exception of the period 1981 to 1982, since 1974. Moreover, unlike the situation in *Robertson*, the rule has been reduced to writing and communicated on each occasion to the Staff Council for the information of all International representatives, the members directly affected; thus satisfying the requirement of the *Robertson* decision.

Brandt, PRB No. 787 II at 7. The PRB further stated that Brandt had miscomprehended its statements in *Robertson* in thinking that they referred to *membership* rights. The Board stated that the restriction imposed by the 90-day rule on Brandt and any other International Representative is not upon their rights as members of the UAW but rather it is their rights as employees of the Union that are circumscribed. PRB No. 787 II at 8. The Board found this to be a very different matter. Though it stated that such a restriction on the terms and conditions of employment of the Union's staff must be brought about by Constitutional amendment; it was satisfied that the actual method by which the 90-day rule was adopted and implemented is not constitutionally flawed. The Court finds the PRB's interpretation of the origin and effect of the 90-day rule both reasonable and fair and thus declines to interfere with that decision. Accordingly, the Court finds the 90-day rule to be a valid and binding provision of the UAW Constitution.

Brandt also attacked the 90-day rule, as does Tucker, on the grounds that it imposed an undue burden on International Representatives seeking to usurp an incumbent's position and provided an unfair advantage to incumbents. The PRB conceded that the rule did impose a burden on an International Representative who wishes to challenge an incumbent officer in requiring a leave of absence for at least 90 days during which time his pay and benefits would be suspended and that an incumbent would be subject to none of these strictures. In response, the PRB stated that this was not a proper characterization of the issue:

> The issue, however, is not relative advantage and disadvantage. The Constitution does not require, in terms of the currently popular idiom, a level playing field. We have long recognized the advantages which incumbency provides, and have consistently ruled that such advantages do not make the electoral process *per se* unfair.

PRB Case No. 787 II at 9 (footnote omitted). The Court finds this analysis to be reasonable and accordingly defers to the judgment of the PRB on this claim.

The Court finds that Tucker has failed to create any genuine issue of fact that his Title I rights were violated and that summary judgment is therefore proper as to Count I of his Complaint. First, Title I does not afford Tucker a legal right to have and hold a position on the union staff. *Finnegan, supra*; *Cehaich, supra*. Second, Tucker has lost *no* membership rights. He remains a UAW member and enjoys all the rights and privileges of any UAW member.[7] He was not prohibited from running for the office of International Representative and he won the election on rerun.[8] The only thing lost by Tucker

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[7] Article 14, § 5 of the UAW Constitution provides that "an International Representative . . . shall be eligible as a candidate."

[8] That Tucker lost visibility, access to leadership meetings and to the floor of the Convention is not fatal since those benefits

was his political appointment as Assistant Director, for which he had no membership right. As noted by the Court in *Finnegan*, "discharge from employment does not impinge upon the incidents of union membership. . . ." 456 U.S. at 438. Finally, Tucker offers no proof other than the timing of his discharge and a claim that the 90-day rule is invalid to show that his discharge was in reprisal for his candidacy. Having determined that the 90-day rule is constitutional and reasonable; the Court concludes that it provided a legitimate basis for Tucker's discharge and was not a deliberate attempt to stifle dissent within the Union.

IV.

In addition to his LMRDA claims, Tucker alleges that his discharge violated the terms of the union Constitution. Here Tucker asserts two separate claims. First, as a UAW *member* he seeks in Count II to remedy the violations of the union Constitution inasmuch as the Constitution is a contract between the Union and its members. Second, as a union *employee*, Tucker seeks in Count III to enforce the provisions of the Constitution insofar as they define the terms of his employment by the UAW. Defendant asserts that this Court does not have federal jurisdiction under the law of this Circuit to entertain these types of claims.

In *Trail v. International Brotherhood of Teamsters*, 542 F.2d 961 (6th Cir. 1976), the Sixth Circuit held that section 301 of the Labor Management Relations Act does not confer jurisdiction in a suit by individual union members for violations of a union constitution. *Trail* involved allegations that the Teamsters breached a contractual duty, embodied in their constitution, to follow certain voting procedures. The district court dismissed plaintiff's

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derived from the position of Appointed Assistant Director. UAW members do not have a membership right of access to the floor of the UAW Constitution.

cause of action since a section 301 suit between a union member and the union itself did not constitute a contract "between any such labor organizations."[9] 542 F.2d at 966-67. In affirming the district court, the Sixth Circuit relied upon the reluctance of Congress and the Courts to authorize judicial intervention in the internal union affairs. *Id.* at 968.

In *Plumbers & Pipefitters v. Local 334*, 452 U.S. 615 (1981), the Supreme Court held that "a union constitution is a contract within the plain meaning of § 301(a)." In *Plumbers & Pipefitters*, the local union brought suit against the international union, alleging a violation of the union constitution. The Court found that § 301 provided a basis for jurisdiction when the union sues an affiliated union for violation of its constitution. The Court, noting a split among the circuits, nonetheless reserved decision on the question of whether an individual union member could sue under § 301(a) for a violation of the union constitution. 427 U.S. at 627 n.6. Given the Supreme Court's refusal to overrule *Trail*, that decision is still controlling in this circuit and has been followed by the district courts. See *Warner v. McLean Trucking Co.*, 627 F. Supp. 203, 217-18 (S.D. Ohio 1985); *Frenza v. Sheet Metal Workers' International Ass'n*, 567 F. Supp. 580, 584-85 (E.D. Mich. 1983). Thus the Court finds that it does not have an independent federal jurisdictional basis over these claims.

Notwithstanding, the Court may still exercise its discretionary power of pendent jurisdiction over the state

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[9] Section 301(a), 29 U.S.C. § 185, provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, *or between any such labor organizations*, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. (Emphasis added.)

law claims. The Supreme Court has ruled that the power to hear pendent claims exists when the state and federal claims "derive from a common nucleus of operative fact." *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The doctrine is designed to promote judicial economy and is discretionary with the court. In exercising this discretionary authority, a court should consider convenience and fairness to the litigants as well as notions of judicial economy. *Id.* at 1139. Since the Court finds that plaintiff's state law claims involve the same operative facts as those that are involved in proof of plaintiff's federal claims under § 101(a)(1) it will, therefore, consider plaintiff's state law claims, Counts II-V.

The Court need not reach the conflict-of-law issue raised in the instant suit since the Court finds that the PRB's interpretation of the constitutionality and operative effect of the 90-day rule in the *Brandt* appeal, as adopted and applied by the Court to Tucker's Title I claim, leads to the conclusion that there is no genuine issue of material fact upon which to base Counts II-V. In his motion for partial summary judgment, Tucker conceded that the PRB's determination as to the 90-day rule might vitiate his LMRDA as well as his union-constitution based claims. Tucker has alleged no other set of facts to support the state law claims.

In his claim that his rights under the UAW Constitution as a member of the union have been violated, Tucker relies on Article 4, Section 5 which requires that all International Representatives have the unconditional and unqualified right to run for International office. The Court finds no breach. Tucker chose to exercise his right to run for elective office. He was not prohibited from doing so. He stood for election against incumbent Region 5 Director Ken Worley and defeated him on the rerun election. As earlier noted, Tucker's discharge affected his status as a union employee and only indirectly im-

pinged on his membership rights. The Court finds that plaintiff has failed to show any genuine issue of material fact as to a violation of the union Constitution. Summary judgment on this count is proper.

Count III raises a breach of employment contract claim as a result of Tucker's termination. Assuming *arguendo* that the union Constitution creates a *Toussaint*-like employment contract, the Court still finds that no breach has occurred, since Tucker was discharged pursuant to a valid candidacy provision, the 90-day rule. Tucker argues that he was not discharged for a proper purpose as defined in the UAW Constitution. Under Article 13, § 5 an International Representative may be removed if he is:

(1) derelict in the performance of any duty; or

(2) guilty of any dishonest act; or in order to

(3) conserve the finances of the International Union.

Tucker claims that none of these grounds were the basis for his discharge and that he could not constitutionally be fired for choosing to run against Regional Director Ken Worley. The Court finds that the PRB's remarks on the same issue in the *Brandt* appeal are apposite here. Here the Board stated in response to a similar argument made in *Brandt*:

> In adopting the 90-day rule 14 years ago, the IEB identified this as a situation where the insuitability of conflict in the ongoing administration of regional affairs dictated a temporary separation of the International representative from his position. Even if the President's authority to apply this policy is strictly limited to the grounds stated in the above proposition, which is not crystal clear, it is not unreasonable to conclude that the potential conflict here involved comes within the terms of dereliction of dtuy. And in more practical terms, the 90-day leave

> imposition seems well within the recognized, more sweeping power to remove completely.
>
> The Region, like a hook and ladder fire truck, requires that both driver and steersman turn in the same direction. The alternative is chaos. Davis was the elected Director of the Region. For the period of his term of office he was entitled to have his staff execute his decisions and application of Union policies. Those who would not or could not would of necessity be derelict in their duties as employees.

PRB No. 787 II at 11. Similarly, Counts IV (wrongful discharge) and V (intentional infliction of emotional distress) fail as they are derivative of the other claims.

For all the foregoing reasons,

IT IS HEREBY ORDERED that plaintiff's motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

/s/ Richard F. Suhrheinrich
RICHARD F. SUHRHEINRICH
United States District Judge

Dated: Jan. 19, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 86-4164

HON. RICHARD F. SUHRHEINRICH

JERRY TUCKER,

Plaintiff,

v.

OWEN BIEBER

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Defendants.

JUDGMENT

In accordance with the Memorandum Opinion and Order in connection with the above-entitled cause entered this date,

IT IS ORDERED AND ADJUDGED that summary judgment be, and hereby is, GRANTED In favor of defendants.

Dated at Detroit, Michigan, this 19th day of January, 1989.

DAVID R. SHERWOOD
Clerk of the Court

By: /s/ Lillian Brooks
Deputy Clerk

APPROVED:

/s/ Richard F. Suhrheinrich
RICHARD F. SUHRHEINRICH
United States District Judge

APPENDIX E

THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW

Case No. 787 II

APPEAL OF: GARY BRANDT
INTERNATIONAL REPRESENTATIVE
REGION 2, UAW
(Cleveland, Ohio),

Appellant

-vs-

INTERNATIONAL UNION, UAW
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA),

Appellee.

DECISION ON RECONSIDERATION

(Issued April 22, 1988)

PANEL SITTING:

Rev. Msgr. George G. Higgins, Chairman, Prof. Benjamin Aaron, Prof. James E. Jones, Jr., Hon. Frank W. McCulloch, Dr. Jean T. McKelvey, Prof. Theodore J. St. Antoine and Prof. Paul C. Weiler.

APPEARANCES:

Gary Brandt and Jerry Switch on behalf of appellant; Jerry Tucker and Joseph A. Yablonski, Esq. on behalf of *amicus*; Ophalandus Brasfield, Warren Davis, Leonard Woodcock, Douglas Fraser, Pat

Greathouse, Richard Shoemaker, George Smith, and M. Jay Whitman, Esq. on behalf of the International Union, UAW.

Gary Brandt has challenged the validity of a rule which requires that an International representative who seeks to run against an incumbent Regional Director take a leave of absence not less than 90 days prior to the date of the election and, in the event his election is not successful, that he accept reassignment to a post outside his former region (hereinafter "the 90-day rule").[1]

In our original decision on in this matter issued August 28, 1987, we concluded that the 90-day rule did not deprive Brandt of any of his Constitutional rights. Following issuance of our decision, Brandt requested reconsideration asserting, among other things, that we had erred in our assumption that the 90-day rule had been adopted by the International Executive Board. By reason of this and other considerations we agreed to grant reconsideration of our decision. At or about the same time Jerry Tucker, a former International representative from Region 5 who, like Brandt, had been a candidate against his incumbent Regional Director in the June, 1986 elections, requested to intervene as *amicus*. Tucker had been terminated as a result of his failure to take a leave of absence more than 90 days prior to the date of the election. In a Federal Court proceeding filed on his behalf by the Secretary of Labor, Tucker has challenged the legality of the 90-day rule. Because Mr. Tucker has an obvious interest in the resolution of the Brandt appeal and because he and his coun-

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[1] The 90-day rule in its current form requires:

"A staff member who decides to run against an officer or Regional Director must make his intentions known and request a leave of absence at least 90 days prior to the convention. Such staff member will be given a leave of absence and be subject to reassignment in the event he is an unsuccessful candidate."

sel, Joseph Yablonski, could be of assistance to us in addressing the difficult and complex issues presented in this challenge, we granted Mr. Tucker *amicus* status. The parties and *amicus* were heard in oral argument in Detroit, Michigan, on March 5, 1988.

ISSUES

The 90-day rule has been challenged on the grounds that it is a rule which has been promulgated by the Administration Caucus, a political party within the UAW, but has never been made a valid governing policy of the Union, and that the rule itself is inherently discriminatory—a device designed specifically to protect the interests of incumbent officers of the Union to the disadvantage and detriment of those of their staff who would exercise a Constitutional right to challenge them.

Background

In the course of oral argument on this reconsideration, former UAW President Leonard Woodcock described some of the events which led to the adoption of the 90-day rule. Mr. Woodcock was a member of the International Executive Board from November, 1947, through May, 1977, and was President of the International Union the last seven years of his tenure. At the time when the 90-day rule was first promulgated, it was he who appointed the Internal Procedures Committee which formulated it.

According to Mr. Woodcock, the caucus system in the UAW had its origin in 1946 when Walter Reuther was first elected President, but controlled only 7 votes out of 25 on the International Executive Board. Even though Reuther did not control the Executive Board, he, as President, had sole right under the Constitution to appoint staff. Through judicious exercise of this authority, Reuther was able to consolidate his power, and the following year his political caucus, the Administration Cau-

cus, was successful in gaining all but three or four positions on the IEB. Likewise, when Leonard Woodcock himself was first a candidate to become a member of the International Executive Board, he pledged in his campaign to eliminate his opponent's staff.

The strength of the UAW administration, Woodcock states, arises out of the recognition that not only is loyalty to the Union required on the part of its officers, but also a loyalty to one another. Likewise, the relationship between a Regional Director and his staff is necessarily one of trust. The Regional Director requires a loyal staff to help him administer the Union's policies and programs. Those staff who would undermine or supplant their Regional Director are regarded as attackers of the unity of the entire Union administration. For example, in 1970 when Bill Casstevens became a candidate for Region 2 running against the then incumbent director, he was personally warned by Reuther that if he failed to win, Reuther would fire him. Casstevens won.

In 1970, there was also another instance of a staff member challenging an incumbent. George H. Robertson challenged Region 1D Director George Merrelli. Unlike Casstevens, Robertson was not successful and was fired following his refusal to accept a transfer out of Region 1D to Chicago. Robertson appealed his dismissal to the Public Review Board (PRB) contending that his firing was in retaliation for his exercising his rights as a member of the UAW to seek elective office. The International Union opposed the PRB's assertion of jurisdiction over the appeal, contending that Robertson's dismissal concerned the employment relationship between the Union and its staff of International representatives. That relationship, it argued, was governed exclusively by a document entitled "Policy Statement Regarding the Relationship Between the International representatives, the International Executive Board and International officers". The Union declared that that document com-

prehended all facets of the employment relationship, that is, it defined the rights of an International representative as an employee (as opposed to his rights as a member of the Union) and provided a separate system of remedies for the protection of employment rights. This Board rejected the International Union's position. It stated:

> "The inevitable consequences of declining jurisdiction in this matter without a full evidentiary hearing would be to establish a rule of interpretation that staff personnel, although required to be union members to occupy staff positions, have no Constitutional protection against reprisals which may be taken against them for engaging in union political activities; no matter how egregious the political reprisals against the occupant of a staff position, he has no recourse to the internal remedial procedures provided by the Constitution where the penalties imposed affect job rights, privileges, or emoluments related to the staff position. The risk of the exercise of certain constitutionally protected membership rights is loss of staff benefits without recourse.
>
> "The Ethical Practices Codes of the UAW guarantee to each member of the Union, among other things, the right to run for office, to nominate, vote, etc. Such rights are, of course, subject to reasonable rules and regulations. However, rules and regulations restricting so basic a membership right as the right to run for office ought not be left to "general understandings" or to documents which are external to the published Constitution.[2]

That decision was issued April 21, 1971.

The first version of the 90-day rule appeared in a memorandum dated August 23, 1973, and which dealt with a number of other issues as well, from UAW Vice

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[2] *Robertson v. International Union, UAW*, 1 PRB 632, 635 (1971).

President Douglas Fraser to the Internal Procedures Committee, that consisted of himself, Vice President Pat Greathouse and Regional Directors Marcellius Ivory, Ken Morris, Joe Tomasi, Ken Worley, Martin Gerber and Ray Ross. As then formulated the 90-day rule provided:

> "A staff member who decides to run against an officer or regional director must make his intentions known and request a leave of absence at least ninety days prior to the convention. Such staff member will be given a leave of absence and be subject to reassignment in the event he is an unsuccessful candidate.
>
> * * *
>
> "A staff member has the same obligation to support a political decision of a caucus as does a member of the Executive Board."

According to Woodcock and Fraser, the Internal Procedures Committee submitted its report to the International Executive Board in January, 1974, during what they termed a "good and welfare" session. Good and welfare sessions of the IEB are not the same as caucus meetings, Woodcock declared. However, he stated, political issues could come up. Good and welfare sessions are used in particular to thrash out issues of Union bargaining policy and no verbatim minutes are kept of these sessions.

Shortly thereafter, Pat Greathouse, at the direction of the IEB, met with the top committee of the Staff Council, the bargaining agent for International representatives, presented a copy of the Fraser Internal Procedures Committee report and advised them that the IEB had adopted it, including the 90-day rule. George Smith, chairman of the Staff Council in 1974, confirmed Greathouse's report of this meeting and added that the information was transmitted to the Council's General Board and to the International representatives at regional meetings.

In 1981 the issue was again considered by an Internal Procedures Committee. At that time the Committee recommended that the 90-day rule be eliminated in favor of a rule which required a staff member running against an incumbent officer or Regional Director to be severed from the staff at the point he or she became a candidate:

> "A staff member who decides to be a candidate for office against an incumbent officer or Regional Director who is endorsed for reelection by the International Executive Board shall be severed from the staff at the point such staff member announces his/her candidacy or at the point his/her activities are such as to establish that he/she is a candidate, which ever occurs first.
>
> "It is understood that every member of the caucus has a right, in the event of a vacancy, to be a candidate for such office. This entitlement carries with it the obligation, however, that any such candidate shall not conduct a full or partial campaign prior to 90 days before a Convention.
>
> * * *
>
> "Any member of the Administration Caucus, has an obligation to notify an incumbent of his/her intention to run for Regional Director or Officer 90 days prior to the Convention."

Following its adoption by the IEB, the 1981 rule was challenged in Federal District Court by the Staff Council in an action to require arbitration of this dispute under the collective bargaining agreement between the Staff Council and the International Union. However, in September, 1982, even before the Court's ruling denying arbitration, the 90-day rule was reinstated in its present form. Again the Staff Council was informed of the Board's action, and its chairman gave Council members a full report of the resolution of the dispute over the 90-day rule in February, 1983.

According to the 1974 IEB members who appeared at this Board's hearing, the original adoption of the 90-day rule was intended 1) to avert the obvious danger of conflicts in the regional administration of union matters, and 2) to open up the electoral process a bit by assuring International representatives challenging incumbents that they would retain job rights even if their candidates failed. That this rule, in the view of the Staff Council also, was clearly preferable to the pre-1974 and brief 1981-1982 situation was demonstrated by their successful efforts to secure its reinstatement in 1982.

DISCUSSION

In *Robertson*, we suggested to the Union how it might proceed in the event it wished to place limitations on the right of International representatives to seek office at the International level:

> "Clearly, if some limitation were intended to apply to International representatives serving or running for higher office, *manifestly* it should appear somewhere in the written documents. Moreover, with regard to the declaration of policy governing the employment rights of International representatives, documents which are external to the Constitution should not be held to modify the Constitution. Such documents necessarily exist subject to the plain language of the Constitution and interpretations thereof which may be incorporated by act of the Conventions.
>
> "Finally, if the International Union wants to restrict the political activity of paid staff personnel against the administration which appoints them in the jobs, an easy and acceptable model for such limitations is readily at hand. After all, union membership in the confines of the Constitution is comparable to citizenship within the United States. For Federal employment, citizenship is a requirement, just as is membership a requirement for union employment in the instant case. However, the Hatch

> Act [citation omitted] restricts the political freedom of Federal employees to actively engage in the political process. It is clearly understood that when one embarks upon the privilege of Federal employment, he waives his rights to engage in the full range of political activity to the extent of running for public office, *at least* while he remains on the public payroll in those jobs restricted by the Hatch Act. It would be a simple matter by Constitutional action to make clear that persons in staff positions such as the subject of the instant case, while fully free to exercise their membership rights to run for higher elective office, would be required, as in the case of local union office,[3] to resign from the payroll job and return to his uncluttered membership status for the purpose of pursuing his political objectives." [4] (Emphasis in original.)

Appellant argues that the International Union failed to follow the directions indicated by the Public Review Board in *Robertson*; that instead of amending its Constitution it adopted a rule without even the benefit of formal action by the International Executive Board. The rule is nothing more than a policy adopted by a political party, the Administration Caucus. As such, it has no legal status.

These are weighty arguments. Concededly, no effort was made to amend the Constitution to incorporate the 90-day rule. Furthermore, it is also clear that the rule was not adopted in any formal session of the International Executive Board. The International Union concedes that there are no minutes reflecting the adoption of the rule, although the Constitution is specific in its

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[3] Constitution, International Union, UAW (1970), Article 14, Section 6.

[4] *Roberston v. International Union, UAW*, 1 PRB 632, 636-37 (1971).

requirement that verbatim minutes be taken at all meetings of the International Executive Board and no formal action shall be taken in executive session.[5]

Despite the admitted force of appellant's argument, we are reluctant to adopt such a restrictive view of what does and does not constitute International Executive Board action. We cannot ignore the fact that the UAW is now, and has been for over 20 years, a one-party institution not in all respects unlike that found in many national governments in which a single political party controls the government, and the officials who formally make and administer the laws pursuant to which the country is governed are selected wholly by that party. As a consequence, in the UAW the lines of demarcation between party, the Administration Caucus, and the formal governing body, the International Executive Board, have become blurred, for 100% of its personnel are, and traditionally have been, members of the Administration Caucus. The Internal Procedures Committee which drafted the 90-day rule in 1973 was comprised entirely of UAW Vice Presidents and Regional Directors, all

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[5] Constitution, International Union, UAW, Article 12, § 19 provides

> "Section 19. Verbatim minutes shall be taken at all meetings of the International Executive Board, (except when the Board, by a seven-eighths (7/8) vote of those present, decides that the best interests of the Union would be served by an informal discussion of the membership of the Board in session as a committee of the whole, in which event the Board shall confine itself to discussion but shall take no formal action, and no minutes shall be taken). Such minutes shall be transcribed immediately and copies thereof shall be distributed to all elected officers of the International Union as soon as completed. Such copies shall be made available to any interested member in good standing for inspection at the offices of the International Secretary-Treasurer and of each International Executive Board Member. In addition, the Secretary-Treasurer shall prepare a summary of official International Executive Board action after each International Executive Board Meeting, which shall be sent to each Local Union."

members of the International Executive Board. An example of that bluring of lines is to be found in the language used in the letters of transmittal of the 90-day rule itself. Thus, Fraser's September 21, 1973, transmittal of the first version of the 90-day rule, is addressed to "International Executive Board Members," and the transmitting statement reads: "Attached is the revised language of the paper adopted by the Board Caucus." And again in September, 1983, when the committee report with the reinstated rule was transmitted by President Owen Bieber to the "International Executive Board" it was with the following notation: "Attached is the revised amended language of Internal rules adopted by the Board Caucus in its Meetings of September 14, 1981 and September 21, 1983." It is noteworthy we think that the transmittals were not to the Admistration Caucus, the body claimed by appellant to have adopted the 90-day rule, but to the International Executive Board, and the body which had proposed the changes was referred to as the "Board Caucus", not the "Administration Caucus". But the "Board Caucus" is not a caucus at all; it was simply the Internal Procedures Committee of the International Executive Board. The fact that the party and the governing body are both comprised of the same personnel apparently leads to this curious intermingling of terminology.

For this Board to rule that the Union can act only through formal action of the Internal Executive Board, recorded in verbatim minutes, would be to ignore the realities of how this Union has long governed itself and would call into question a wide range and untold number of IEB actions over the years. Indeed when, not long ago, we recommended to the Union that it revise substantially certain of its financial requirements and practices, particularly as these affected operations of its Regions and various funds maintained in the Regions,[6] it

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[6] *Ethical Practices Issues In Region 4, UAW*, PRB Case No. 640 (1985).

did so in a series of Administrative Letters over the signature of the International President. These Administrative Letters, which the Union has promulgated since 1948, are addressed to all local unions and in them there is announced from time to time important Union policy determinations on matters involving collective bargaining, disaffiliation with the AFL-CIO and the like. At times the origin of the policy, such as by action of the International Executive Board, is apparent; at other times it is not.

In any event, the Union and its staff have been operating under the 90-day rule, with the exception of the period 1981 to 1982, since 1974. Moreover, unlike the situation in *Robertson*, the rule has been reduced to writing and communicated on each occasion to the Staff Council for the information of all International representatives, the members directly affected; thus satisfying that requirement of the *Robertson* decision. Although appellant Brandt has disclaimed any personal knowledge of the rule, he does not deny that once he did decide to seek office against his Director, at least at that time he became aware of its provisions and complied, albeit unwillingly, with its requirements. Asked during the course of oral argument if formal action had been taken by the International Executive Board to adopt the 90-day rule that would save it, appellant responded it would not; that only a Constitutional amendment would have this effect.

This argument devolves from our dictum in Robertson:

> "Recognizing that membership rights of employed staff may very well differ, and recognizing substantial problems that can and do occur when staff personnel engage in political activity, it is nevertheless our opinion that limitations on the full exercise of membership rights by staff personnel must be specifically enunciated in the Constitution of the International Union. Our reading of it, to the extent that

> the Constitution deals with the issue, argues for the protection of the rights of International representatives to engage in political activities." [7]

Appellant miscomprehends our statement. The limitation to which we referred in this comment is a limitation on *membership* rights. Later in our opinion we cited the Hatch Act as a possible model should the Union wish to restrict membership rights. But the restriction imposed by the 90-day rule on Brandt and every other International representative is not upon their rights as members of the UAW. They are not restricted in any way from seeking International office (as they are from seeking local union office). It is their rights as employees of the Union that are circumscribed. This is a very different matter in our judgment. Surely not all the terms and conditions of the employment of the Union's staff comprehend matters of exclusive Constitutional concern. If International representatives are to be "Hatched", i.e., prohibited by virtue of their holding this office from seeking elective office in the International Union, that requirement, like the concomitant requirement as respects local union office, must be brought about by Constitutional amendment, for then there would be a class of UAW members, International representatives, who would be barred by virtue of their position from seeking International office.

But we are satisfied that the method by which the 90-day rule was adopted and implemented is not constitutionally flawed. Although it might have been preferable for the IEB to have formally adopted the rule by entering it in the minutes of its proceedings, we are satisfied that the rule was enacted in the same fashion that the IEB transacts much of its business. Furthermore, the rule is clearly something more than merely an internal rule of a political party. The Staff Council was informed

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[7] Ibid Footnote 2 supra.

of the *Board's* action at the time of its original adoption and again in 1981, at the time of its amendment, when it undertook a legal challenge of the change in policy which it embodied. Finally, following reinstatement of the rule in its original form in late 1982, as noted above the Staff Council was again informed, and following the Court's decision in February 1983, in the comprehensive memorandum to all Staff Council members, its Chairman asserted: "Essentially the Staff Council won the issue . . . . when the IEB rescinded the 1981 policy and reinstated the earlier policy." Anyone who was or who subsequently became an International representative should reasonably have been aware of this requirement of the terms and conditions of his employment.[8]

Validity of the 90-day rule

Appellant also attacks the validity of the 90-day rule on the grounds that it imposes an undue burden on International representatives seeking to unseat incumbent officers, and further that it was intended to, and does, provide an unfair advantage to incumbents. Appellant's contentions in this respect may be conceded without, however, resolving the underlying issue. Clearly the rule does impose a burden upon an International representative who wishes to challenge an incumbent officer; he must take a leave of absence for at least 90 days during which time his pay and benefits are suspended. A not

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[8] We are mindful that appellant and *amicus* have also seriously questioned whether the PRB should fully credit the assertions that it was the IEB that actually adopted the 90-day rule in the executive sessions. We are aware that this Board's structure and procedures do not make feasible on appeals before it the same probing cross-examination techniques available in trial court litigation to test the veracity of materials presented to it. But the attendant circumstances in 1974, 1981, 1982 and 1983 lend solid credence to the statements made to us by the principal actors on those occasions: that the adoption, withdrawal, reinstatement and application actions were in fact taken by the IEB.

inconsiderable financial burden is thus imposed.[9] If he is unsuccessful in his challenge, he is subject to reassignment, which may require him to move his home and relocate his family. An incumbent is subject to none of these strictures. If challenged for his office, he does not have to give up his salary during the campaign and if he loses, while he may be out of a job, there is nothing automatic about any transfer should his employment be continued by the Union in some other capacity. Clearly, incumbents are advantaged over non-incumbents, particularly non-incumbent members of their staff.

The issue, however, is not relative advantage and disadvantage. The Constitution does not require, in terms of the currently popular idiom, a level playing field. We have long recognized the advantages which incumbency provides, and have consistently ruled that such advantages do not make the electoral process *per se* unfair.[10]

As we have noted, appellant in advancing his claims has mingled issues of membership rights and job rights. But the two are separate and distinct. The Constitution grants him as a member in good standing the right to run for Union office. Not only does it enunciate this right in general for all members, but it states specifi-

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[9] In this connection, however, we note the undenied claim of the International Union at the hearing that the immediate financial burden on such a candidate in practice is lessened by the fact that International representatives almost invariably have substantial, accumulated vacation leave pay available to draw upon in the 90-day period.

[10] Cf., e.g., *Donovan v. Local 2000*, UAW, 2 PRB 813 (1979). Appellant claims that the burdens imposed by the rule are so onerous that they virtually foreclose any democratic challenge to incumbents. The record before us on reconsideration, however, reveals that in 1986 four such challenges were mounted. Of these, one was successful, and another—*amicus* Tucker's—came within a fraction of a vote of succeeding, with a rerun now pending by Federal Court Order.

cally that, "An International Representative or temporary organizer shall be eligible as a candidate for an elective office in the International Union." [11] Appellant Brandt chose to exercise his rights. He stood for election against incumbent Region 2 Director Warren Davis and withdrew his candidacy only at the eleventh hour when it was apparent that it would fail. The other right which Mr. Brandt seeks to assert, that is, the right to continue in his post during the campaign and to be free from transfer if his campaign is unsuccessful is not, as we have stated, a membership right at all.

Nor is this a claim such as we were faced with in *Robertson*, where the appellant was charging that his transfer was in retaliation for his exercise of his political right to run for office. As previously observed, at the time *Robertson* was decided the 90-day rule had not been adopted. Robertson did not know going into the contest that his failure to prevail might subject him to transfer. Indeed, there was no policy to this effect; the prevalent practice was to fire unsuccessful candidates. In any event, we never had the opportunity to decide whether Robertson's transfer was in fact retaliatory, for shortly after our decision was issued asserting jurisdiction over his claim, Robertson was elected president of his Local Union and abandoned his challenge to the International Union's action. But Brandt knew going in that if he was unsuccessful in his challenge, although he would not lose his job, he would be subject to transfer out of his Region. Nothing in the Constitution specifically guarantees unchanged job rights to an International representative during his electoral challenge to an incumbent.

Approaching the issue from another direction, Brandt argues that his job rights are guaranteed by the Constitution; that the President is authorized to fire him only for dereliction of duty, dishonesty, or to conserve the

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[11] Constitution, International Union, UAW (1986), Article 14, § 5.

finances of the Union. None of these conditions apply to him. His only "transgression" was to become a candidate against Regional Director Davis. Since the President could not Constitutionally fire him for this act, he could not require him to leave his post for 90 days either or direct his transfer to another Region.

The system of governance of the UAW is set forth in its Constitution. It is a three tiered structure with the President having responsibility for the day-to-day operation of the Union.[12] Moreover, the President is given specific authority to "appoint such representatives as

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[12] Constitution, International Union, UAW (1986), Article 7, § 1 provides:

> "*Section 1.* The International Union shall be governed by its membership in the following manner:
>
> (a) The highest tribunal shall be the International Convention composed of delegates democratically elected by the membership of Local Unions.
>
> (b) Between Conventions the highest authority shall be the International Executive Board. The Board shall hold regular quarterly meetings and such special meetings as are required.
>
> (c) Between meetings of the International Executive Board the administrative authority of the International Union shall be vested in the International President. The International President shall be responsible to the International Executive Board for the administration of the Union between International Executive Board meetings, according to the Constitution, the actions of the International Convention and the decisions of the International Executive Board. On all matters of major importance s/he shall consult the other International Executive Officers. S/He shall report her/his actions to the International Executive Board for its approval or rejection.
>
> (d) In the case of the incapacity of the International President, her/his powers and duties shall be assumed by an Officer of the International Union who shall be selected by the International Executive Board.

s/he may deem necessary from time to time such appointments to be pending the approval of the Internal Executive Board." That same Constitutional provision also gives the International President the right to terminate International representatives:

> "The International President may remove from the payroll any Representative derelict in the performance of any duty, guilty of any dishonest act, or to conserve the finances of this International Union, pending the approval of the International Executive Board at its next session." [13]

Brandt would have us read this provision restrictively. He was, he asserts, neither derelict nor dishonest and could not have been removed to conserve the finances of the Union. The argument is disingenuous. Warren Davis was elected by the membership of his Region of the Union to be their representative on the International Executive Board, to lead the Region and to service its needs. Brandt on the other hand was appointed to assist Davis in the carrying out of his responsibilities. Davis was elected for a three-year term. Brandt's term of appointment was indefinite. At the point that Brandt decided to challenge Davis while Davis' term of office had not yet concluded, his capability to perform his job duties was altered. In adopting the 90-day rule 14 years ago, the IEB identified this as a situation where the inevitability of conflict in the ongoing administration of regional affairs dictated a temporary separation of the International representative from his position. Even if the President's authority to apply this policy is strictly limited to the grounds stated in the above provision, which is not crystal clear, it is not unreasonable to conclude that the potential conflict here involved comes within the terms of the dereliction of duty. And in more practical terms, the 90-day leave imposition seems well

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[13] Constitution, International Union, UAW (1986), Article 13, § 5.

within the recognized, more sweeping power to remove completely.[14]

The Region, like a hook and ladder fire truck, requires that both driver and steersman turn in the same direction. The alternative is chaos. Davis was the elected Director of the Region. For the period of his term of office he was entitled to have his staff execute his decisions and applications of Union policies. Those who would not or could not would of necessity be derelict in their duties as employees.

Appellant also urges us to find the 90-day rule discriminatory and therefore invalid because no such limitation is placed on International representatives who run for vacant seats as Regional Directors. But the short answer is that the potential conflict in regional administration noted above does not exist in the cited situation. The different situation here justifies the rule.

In order to rule for appellant we would have to declare that it is unreasonable *per se* to impose any restriction on the right of an International representative to challenge his incumbent; that the representative should be able to remain in his job undisturbed and campaign against his boss while continuing to receive full salary and benefits. We reject this position as extreme and unrealistic. If the Union may lawfully require that an International representative seeking International office against an incumbent resign his position in order to do so, certainly the lesser requirement that he take a leave

---

[14] The right of a union administration to select and maintain a loyal staff has been specifically recognized by the U.S. Supreme Court:

> "Far from being inconsistent with this purpose, the ability of an elected Union president to select his own administration is an integral part of insuring a Union's administration's responsiveness to the mandate of the Union election." *Finnegan v. Leu*, 456 U.S. 431, 441.

of absence does not constitute an undue hardship. The less onerous requirement it seems to us enhances rather than restricts basic Union democracy. Surely, one who believes that he or she is more fit to govern than an incumbent will be less deterred from offering a candidacy if the consequence is a leave of absence with a guarantee of return to some equivalent assignment at its conclusion, as opposed to a resignation. We conclude the 90-day rule is neither unconstitutional nor unreasonable.[15]

We reaffirm our decision of August 28, 1987.

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[15] In this decision, made under the Constitution and rules of the Union, we express no opinion on the application of Federal law or the Union's rules to variant factual situations such as may be found in the pending court proceeding of the Secretary of Labor on behalf of *amicus*.

APPENDIX F

[NO LETTERHEAD]

September 27, 1983

To: International Executive Board Members

From: Owen Bieber

Attached is the revised amended language of Internal rules adopted by the Board Caucus in its Meetings of September 14, 1981 and September 21, 1983.

FJ/shk

opeiu494

Attachment

Internal Procedures Committee

It was agreed that it would be worthwhile to re-state some of the established rules at the International Executive Board meeting, such as, the obligation of a National Department Director to consult with a Regional Director before they approached a local union person or a Regional Staff person to come on their staff.

The Regional Director could deny the National Department Director the right to contact the local union or staff person but then the National Department Director could take his case to the President for resolution in the event he wished to pursue the matter.

All Regional functions which are organized and conducted by National Departments must first be cleared with the Region. This would not go to collective bargaining problems in which case the Region should be advised of National Departments entering the Region.

Adherence to the policy which provides for all functions affecting a local union to be cleared through the Regional Director, would also apply to the internal politics of the local union. It would not be appropriate under this policy for International Staff members, as part of the Administration Caucus, to involve themselves in the affairs of a local union, either directly or indirectly, without first advising their Department Head who would have the responsibility of clearing that relationship with the Regional Director.

In the event a local union leadership group complains of International Union interference with the affairs of that local union, and such complaint is brought to the attention of the Regional Director, it should be the latter's responsibility to raise the issue with the National Department Head, if necessary.

When an officer is entering the Region for any reason, as a matter of courtesy, he should advise the Regional Office.

When a Regional Director is placing an individual on staff from a plant that operates under a National Agreement, the Regional Director should consult with the Director of such department for his evaluation of the individual.

The committee also agreed to report to the Board a procedure for endorsement of incumbent Board Members. The following was agreed to: Every incumbent can assume he has the support of his colleagues unless specifically advised to the contrary.

In the event one member of the International Executive Board feels he cannot support another member, he should so advise him or her ninety days prior to the convention or prior to the mailing of the Convention Call, whichever is later.

The member of the International Executive Board who declines to support the other member should inform him of the specific reasons why such support will not be forthcoming.

The member who has been refused support can ask the President to intervene which the President can do or in the alternative the President can appoint a committee of the International Executive Board to attempt to mediate the matter.

If the problem is not resolved, the member who was refused endorsement could take the matter to the International Executive Board caucus. Under such a procedure there are at least three conceivable outcomes:

1. The International Executive Board could agree with the individual who is refusing to endorse his colleague and as a group refuse to endorse the incumbent.

2. The International Executive Board caucus could come to a decision that circumstances dictated that one member was not obligated to support the other and was free to go his own way.

3. Instruct the member that he must support his colleague or he himself will not be supported or he may be opposed by the entire caucus.

Anyone holding a minority point of view of the International Executive Board can appeal the International Executive Board decision to the Steering Committee and if dissatisfied with the decision of the Steering Committee, can take the appeal to the National Caucus.

Mechanism should be established to allow local unions or staff to bring to the International Executive Board an alleged act or acts of misconduct of an officer or a Regional Director.

A staff member who decides to run against an officer or Regional Director must make his intentions known and request a leave of absence at least ninety days prior to the convention. Such staff member will be given a leave of absence and be subject to reassignment in the event he is an unsuccessful candidate.

It was agreed that we would review the structure of our National Caucus and among other things, make preparations for a roll call vote should one be necessary.

A staff member has the same obligation to support a political decision of a caucus as does a member of the Executive Board.

The committee also recommended that each region should have a Regional or Area Caucus. The Regional or Area Caucus will be structured in accordance with the geographic, population makeup, and/or traditions of a region. Loyalty of local union leadership and members to the Administration Caucus, creates an obligation for the Administration, through the Regional Director, to be helpful when called upon, to that same leadership and membership.

The programs and policies of the Administration as may be determined through caucus decisions are to be supported by the caucus members.

No. 90-53

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JERRY TUCKER,

Petitioner,

v.

OWEN BIEBER and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Sixth Circuit

---

BRIEF IN OPPOSITION FOR BIEBER & UAW

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The "90-day" rule requires *appointed* UAW staff to take a 90-day leave of absence if they run against the incumbent Regional Director under whom they serve. If unsuccessful, they are reassigned, and not discharged. Petitioner Tucker, holding the senior political appointment in the Southewestern United States, announces less than one month before the election, and is fired for violation of this rule. However, he is *not* prohibited from running. In the same round of elections, three other appointed staff observe the rule. One wins, and two are reassigned.

1. Under the settled principles of *Finnegan v. Leu*, 456 U.S. 431 (1982) and *Sheetmetal Workers v. Lynn*, 488 U.S. 347 (1989), distinguishing the cases of appointed and elected officials, did the courts below correctly apply *Finnegan*?

2. Does § 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, confer federal jurisdiction on an action *by a member* alleging breach of the UAW CONSTITUTION, as a contract?

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Respondents.

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---

BRIEF IN OPPOSITION FOR BIEBER & UAW

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and Owen F. Bieber,[1] its President, by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari.*

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[1] Here after, jointly referred to as the "UAW" or "Union".

COUNTERSTATEMENT OF THE CASE

The best statement is that of the Sixth Circuit, relying on the District Court.[2] It has the added advantage of being neutral:

Jerry Tucker held an *appointed* position on the UAW staff, as Assistant Director of Region 5. This is the senior political and administrative appointment in the Southwestern United States, serving under Ken Worley, the elected Regional Director.[3]

Since 1973, the UAW has had a "90-day leave" rule.[4] The rule requires appointed UAW staff to take a 90-day leave if they run against the incumbent Director who appointed them. It was adopted "to promote democratic competition within the union's structure by assuring staff members that they can retain their appointed staff positions if they fail to be elected to office." [5] In contrast, federal regulations, 29 C.F.R. § 452.48 (1989), permit unions to prohibit appointed employees from running for office.[6]

In 1986, Petitioner Tucker, announced his candidacy against Worley *less than one month* before the election,

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[2] *Tucker v. Bieber*, 900 F.2d 973, 974-76 (6th Cir. 1990), *reprinted* in the Addendum to the Petition, at 1a-15a, *affirming*—F. Supp.—(E.D. Mich. 1989), 131 L.R.R.M. (BNA) 2979 & 2987, *reprinted* 16a-40a.

[3] 900 F.2d at 975, or 3a-4a.

[4] *See, Brandt v. UAW (Brandt II)*, PRB No. 787 II (1988), *reprinted* 41a-60a, *esp.* 45a-46a.

[5] 900 F.2d at 979, or 12a.

[6] 900 F.2d at 979, 12a. The regulation provides, 29 C.F.R. § 452.48: "A labor organization may in its constitution and bylaws prohibit members who are also its full-time non-elective employees from being candidates for union office, because of the potential conflict of interest arising from the employment relationship which could be detrimental to the union as an institution."

and was fired for violation of this rule. However, he is *not* prohibited from running. In the same round of elections, three (3) other appointed staff observed the rule. One was elected, and two were reassigned.[7]

Even so, Tucker ran a vigorous campaign, and lost by the narrowest of margins, 324.577 to 324.415.[8]

Tucker then protested the election to the Secretary, who succeeded in persuading the (same) District Court to order a rerun.[9] Tucker won the rerun, and served until the 1989 UAW Convention. In 1989, Tucker lost by a 2-1 margin to Roy Wyse, another staff member who had taken a 90-day leave.[10] On appeal of the Secretary's election cases, the Sixth Circuit held that intervening events had mooted the cases, and vacated. *Brock & Tucker v. UAW*, 889 F.2d 685 (6th Cir. 1989).

Meanwhile, in the instant litigation, one of the other staff who had taken the 90-day leave, Brandt, challenged the "90-day leave" rule before the Public Review Board (PRB). That body consists of independent, senior scholars, and has final appellate authority under the UAW CONSTITUTION.[11] The Public Review Board upheld the

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[7] 900 F.2d 978, 9a. The Sixth Circuit was moved to observe, ironically, "[t]hough Tucker seems incapable of remembering it, he nearly defeated Worley in the election, and another challenging appointee won his race." 900 F.2d at 978-79, 11a. Understandably, Tucker's cognitive dissonance continues in his Petition.

[8] 900 F.2d at 975, 978-79, or 4a & 11a.

[9] *Brock & Tucker v. UAW*, 682 F. Supp. 1415 (E.D. Mich. 1988) (Suhrheinrich, J.). The Secretary attacked the "90-day leave" rule in this litigation, but only on the ground that it was not properly adopted. The District Court did not reach this claim, holding the issue moot as the rerun had already been ordered on other grounds. Tucker's margin over Worley was 34 votes, 362.2 to 327.8, *Brock & Tucker v. UAW*, 889 F.2d 685, 689 (6th Cir. 1989).

[10] *Brock & Tucker v. UAW*, 889 F.2d 685, 689 (6th Cir. 1989).

[11] 41a, "Panel Sitting": Rev. Msgr. George G. Higgins, of Catholic University, the U.S. Catholic Conference; Prof. Benjamin Aaron,

rule, leading Tucker to intervene and obtain reconsideration. The Board heard from Tucker's counsel, as well as those who adopted and promulgated the rule.[12] They then issued a lengthy decision, addressing the various factual and interpretative arguments advanced.[13]

The District Court held, on cross-motions for summary judgment, that Tucker had lost no *membership* rights under *Finnegan*, because tenure in an *appointed* staff job was not a membership right under § 101, 29 U.S.C. § 411. In this the Court expressly followed *Finnegan v. Leu*, 456 U.S. 431 (1982). The Court then found the Public Review Board's findings, both on facts and the meaning of the UAW CONSTITUTION, were fair and reasonable. The "90-day leave" rule, held the Court, is "a valid and binding provision of the UAW CONSTITUTION." (33a) The District Court held that "the 90-day rule is constitutional and reasonable," so "it provided a legitimate basis for Tucker's discharge and was not a deliberate attempt to stifle dissent within the Union. (35a) While obedient to the Sixth Circuit's holding in *Trail v. IBT*, 542 F.2d 961 (6th Cir. 1976), that § 301, 29 U.S.C. § 185, does not confer jurisdiction in a suit by individuals for violations of their union constitution, the District

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UCLA School of Law; Prof. James E. Jones, University of Wisconsin Law School; Hon. Frank W. McCulloch, Prof. *Emeritus*, University of Virginia Law School, and formerly Chair of the National Labor Relations Board; Dr. Jean T. McKelvey, Cornell University, School of Industrial & Labor Relations; Prof. Theodore J. St. Antoine, University of Michigan Law School, and formerly Dean; and Prof. Paul C. Weiler, Harvard University Law School. *See also, Monroe v. UAW*, 723 F.2d 22, 24 n.3 (6th Cir. 1983), or *Wagner v. General Dynamics*, —— F.2d —— (6th Cir. 1990), 134 L.R.R.M. 2444, 2446 (BNA).

[12] This is recited in the Public Review Board's decision on reconsideration, *Brandt v. UAW*, PRB No. 787 II, at 43a-48a. The witnesses included Leonard Woodcock, Douglas Fraser, and Patrick Greathouse.

[13] *Brandt v. UAW*, PRB No. 787 II, *reprinted* at 41a-60a.

Court explicitly found that, even so, there was *no breach* of that "contract." (37a) When *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), came down, the District Court reviewed and reaffirmed its holdings, finding that *Lynn* reaffirmed *Finnegan* as to appointed officials. (16a-19a)

On appeal, the Sixth Circuit affirmed, carefully following the distinction between appointed and elected union officials established in *Finnegan* and *Lynn*,[14] and holding that Tucker had not been injured in any *membership* rights. Like the District Court, the Sixth Circuit approved the Public Review Board's findings, holding there was not breach of "contract".[15] It declined to depart from *Trail* on the question of whether § 301 jurisdiction should be extended to individual actions on union constitutions, although aware of divergent judicial opinion on the point.[16]

ARGUMENT

This litigation, like most, is of intense importance to those directly involved. The legal issues, nevertheless, are prosaic, and are cast up in a context which is both fact-specific and otherwise ill-suited for this Court's review.

I. *Finnegan* and *Lynn*

Like Tucker, and probably everyone else, we are firmly convinced of the need for a vital democracy in the union movement. The importance of those issues lead this Court to take *Finnegan* in the first place. But, having taken *Finnegan* and decided it, there is no need to take it again.

Certainly, there is no need to revisit such a precedent in order to explore the finer points of some "chilling effect", visited upon an *appointed* member of the union's staff, who wants to be paid to run against the very

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[14] 900 F.2d at 977-79, or 7a-11a.

[15] 900 F.2d at 979-80, or 11a-13a.

[16] 900 F.2d at 980, or 14a.

elected officials who appointed him. Yet, in the end, this is precisely the reason Tucker gives for granting the writ.

Finnegan resolved the case of an *appointed* union official, holding that democracy was served, not retarded, by allowing elected officials to remove disloyal staff. There is no membership right to appointed union office. 456 U.S. at 441. The Court did not reach two issues—whether the same rule should apply to the removal of *elected* officials, and whether some very low-level appointees might be exempt. 456 U.S. at 44 n. 11. The Court was also careful to reserve on whether a Title I action might arise where the removal was "part ~~of a purposeful and~~ deliberate attempt . . . to suppress dissent." 456 U.S. at 441.

In 1989, the Court settled the question of the removal of *elected* officials in *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989). In so doing, the Court did not reexamine *Finnegan*, but built on it. The whole analysis of *Lynn* is framed on the contrast between appointed and elected officials:

> In *Finnegan*, this goal was furthered when the newly elected union president discharged the appointed staff of the ousted incumbent. Indeed, the basis of the *Finnegan* holding was the recognition that the newly elected president's victory might be rendered meaningless if a disloyal staff were able to thwart the implementation of his programs. While such patronage-related discharged had some chilling effect on the free speech rights of the business agents, we found this concern outweighed by the need to vindicate the democratic choice made by the union electorate.
>
> The consequences of the removal of an elected official are much different. [488 U.S. at ——, 109 S.Ct. at 644]

Where an elected official is removed, "the union members are denied the repersentati[redacted] their choice" and de-

prived "of his leadership, knowledge and advice. . ." 488 U.S. at ——, 109 S. Ct. at 645.

Finnegan and *Lynn*, then, recognize that some "chilling effect" can occur. But the Court implements the Congressional intent by settling upon a practical, demoncratic distinction. The removal of an *appointed* official does not violate membership rights, protected under § 101, but the removal of an *elected* official generally does.[17]

These precedents leave the Circuits with clear guidance, which, as this case indicated, they have no trouble following. There is no call to regress into confused and uncertain speculations about "chilling effect."

II. Section 301

In *Plumbers v. Plumbers Local 334*, 452 U.S. 615 (1981), this Court held that, as between a Local and an International Union, § 301 conferred jurisdiction to sue on the union constitution as a "contract". Such a case was a contract suit, literally, "between any such labor organizations." 29 U.S.C. § 185(a). The Court expressly reserved the question of § 301 jurisdiction in suits by individuals.[18]

We acknowledge, as did the Sixth Circuit, that the Circuits have since split on this particular issue.

This is not the vehicle, however, to resolve that split. There are several reasons:

First, it would be a futile exercise. The courts below independently held, as did the Public-Review Board, that there was no breach of the UAW CONSTITUTION here.

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[17] From his concurrence, Justice White alone indicated discomfort with such a "bright line" approach. 488 U.S. at ——, 109 S. Ct. at 647.

[18] "We also do not need to decide whether individual union members may bring suit on a union constitution against a labor organization . . . (citing the Circuit split)." 452 U.S. at 627 n.16.

Tucker is wrong on the facts, and is wrong on his interpretation of the UAW CONSTITUTION and its history. Traditionally, it is the task of *inferior* federal courts to clear such swamps.

Second, the gravamen of this litigation is the *Finnegan* issue, not a refined point of § 301 jurisdictional construction. *Finnegan* is an adequate ground for the result below. Resolution of this "case or controversy" would be retarded, not advanced, by reaching into a minor subplot to resolve a ten year old jurisdictional point.

Third, and last, such individual "contract" claims on union constitutions are notoriously fact-specific. They arise in a range of disputes. The more interesting involve things like ratification of labor agreements (*e.g.*, *Trail*), where the union refuses to provide dispute resolution tribunals. In practice, cases like the instant one, involving union employment, are born and die as § 101 (a) actions under the LMRDA. The only real difference is that the Sixth Circuit requires this, but some other Circuits do not. Such a difference is one of emphasis, rather than a vigorous split. It will likely mature out of existence without the attention of this Court. If it does not, no harm is done.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to *deny* the Writ.

Respectfully submitted,

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(3)

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Jerry Tucker submits this reply brief in support of his Petition for Writ of Certiorari.

A. The Decision Below Presents a Clear Issue of National Importance: Whether Union Incumbents Can, With Impunity, Discharge Appointed Staff Members Who Exercise Their Guaranteed Rights to Run for Union Office.

In the Petition, we maintained that from the standpoint of union democracy, which Congress sought to

foster by the enactment of the Labor-Management Reporting and Disclosure Act ("LMRDA"), this case might be the most important ever to come before this Court. The decision below, we said:

> [p]ermit[s] incumbent officers to maintain party discipline by discharging "disloyal" staff members for exercising protected electoral rights [,] frustrates the free choice of leaders by the union rank-and-file and insures the perpetuation of the one-party system. It squelches opposition candidacies by the sole persons with realistic prospects of unseating entrenched incumbents.

Pet. at p. 13. Respondents' opposition never addresses these important reasons for granting the Petition and ignores altogether this Court's consistent recognition that the LMRDA must be interpreted in light of Congress' basic objective of ensuring that unions are democratically governed and responsive to their rank-and-file members.

In the face of this Court's majority and dissenting opinions in *United Steelworkers of America v. Sadlowski*, 457 U.S. 102 (1982), underscoring the importance of staff candidates to Congress' objective of fair and open union elections, the UAW's Opposition reveals that it reads the decision below as a license for entrenched incumbents in a one-party union to retaliate against any electoral challenge mounted by an appointed official. The UAW argues that this Court need not "explore the finer points of some 'chilling effect,' visited upon an appointed staff member who [has the temerity] . . . to run against the very elected officials who appointed him." Opp. at pp. 5-6.[1] The UAW thus confirms the importance of this

[1] The UAW claims that Tucker wanted "to be paid" to run against the incumbent who, incidentally, was also being paid while he was a candidate for re-election. The record fact is Tucker had requested an unpaid leave-of-absence, but "the requested leave was denied him. He was instead discharged from his staff position at Owen Bieber's behest . . . ." (A. 22a).

case to the enforcement of the LMRDA and to its overall objective that unions be governed from the bottom up and not from the top down.

The UAW tacitly concedes that *this* Union's membership, through the UAW Constitution, conferred upon Tucker and other appointed staff members the unconditional right to run for union office. The UAW never denies that the "90-day" Rule, which the Secretary of Labor has challenged as illegal, operates only when an incumbent is challenged. Nor does it deny that the "90-day" Rule was a caucus rule, adopted by the UAW hierarchy, which had never been submitted to or approved by the Union's members. The UAW acknowledges that Tucker "was fired for violation of this rule," Opp. at p. 3, created by incumbents for their own protection.

By arguing that the election-eve "removal of an appointed official does not violate membership rights protected under § 101" of LMRDA (Opp. at p. 7), the UAW ignores this Court's holding in *Finnegan v. Leu*, 456 U.S. 431, 441 (1982), that discharges such as Tucker's—part of a purposeful attempt to suppress dissent by destroying a fledgling opposition party—*are* indeed cognizable claims under LMRDA § 101. See Pet. at p. 15.

Most telling, finally, is the UAW's misguided assertion that this case presents "no call to regress into confused and uncertain speculations about 'chilling effect.'" Opp. at p. 7. This Court has long recognized that retaliatory conduct toward activist union members does chill the exercise of rights by other union members, and that it is actionable precisely because others may be intimidated from exercising their statutory rights. The "chilling effect" of abuses of power by union incumbents is not some vague, illusive, or esoteric concept. It has been the guiding principle that has informed this Court's decisions in *Hall v. Cole*, 412 U.S. 1 (1973), in *Finnegan v. Leu*, 456 U.S. 431 (1982), and in *Sheet Metal Work-*

ers Int'l Ass'n v. Lynn, —— U.S. ——, 109 S.Ct. 639 (1989). It is precisely because the courts below (and now the UAW) have ignored the effect that Tucker's firing had on other UAW members, that the decision below should be reviewed and reversed by this Court.

B. The Decision Below Is in Conflict with the Decisions of Other Courts of Appeals on Whether a Union Member's Union-Constitution Based Claims Are Federal Claims.

Respondents acknowledge, as they must, that the Circuits have split on whether jurisdiction under § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, extends to claims like Tucker's. Opp. at p. 7.

Contrary to Respondents' suggestion, this case is a proper vehicle for resolving this Circuit conflict. We have argued that the jurisdictional ruling below determined the outcome of Tucker's union constitution-based claims. Had the Sixth Circuit looked to federal law and policy, it would have been obliged to uphold those claims, in light of this Court's decision in *Local 3489, United Steelworkers of America v. Usery*, 429 U.S. 305 (1977), and a corresponding regulation of the Secretary of Labor invalidating advance candidacy-declaration rules. 29 C.F.R. § 452.51. Respondents never contend otherwise.

It is no answer, then, to say that the conflict among the Circuits is not a "vigorous split"—whatever this may mean. This case turned on that split, and future cases may as well—including disputes over official discharges. *Cf. Rutledge v. Aluminum Workers Int'l Union*, 737 F.2d 965, 970 & nn. 6-8 (11th Cir. 1984) (remanding discharged union official's constitution-based claim to district court for exercise of pendent jurisdiction and reserving determination of federal jurisdictional issue).[2]

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[2] As we have previously suggested, cases involving not simply the discharge of appointed union officials, but the discharge of

CONCLUSION

For all of the reasons offered here and in the Petition, a writ of certiorari should be granted, and the decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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staff-member candidates are not rare. *See, e.g., Retail Clerks Union, Local 648 v. Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012 (D.D.C. 1969); *Yablonski v. United Mine Workers of America*, 71 L.R.R.M. (BNA) 3041 (D.D.C. 1969). In the wake of the decision below, of course, such discharges may become commonplace.